ORIGINAL

(3)

No. 97-6146

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

ANGEL JAIME MONGE,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Did the Supreme Court of California properly find that the truthfulness of a prior felony conviction, alleged in a noncapital case, may be relitigated without violating the Double Jeopardy Clause?

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OPINION OR JUDGMENT BELOW

In a 4-to-3 opinion filed August 27, 1997, the Supreme Court of California allowed Respondent to relitigate the truthfulness of Petitioner's prior felony conviction. That court held relitigation in this noncapital case would not violated the Double Jeopardy Clauses of the United States and California Constitutions. People v. Monge, 16 Cal. 4th 826, 831-45, 66 Cal. Rptr. 2d 853, 941 P.2d 1121 (1997). The opinion is attached as Appendix A.

STATEMENT OF JURISDICTION

Petitioner invokes the jurisdiction of this Court under Title 28, United States Code section 1257(3).

CONSTITUTIONS, STATUTES OR REGULATIONS

Petitioner relies on the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution, as

incorporated into the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

STATEMENT OF THE CASE

In an amended information filed by the District Attorney of Los Angeles County (Case No. KA025876), Petitioner was charged with the crimes of adult using a minor in violation of California Health and Safety Code section 11361(a), sale or transportation of marijuana in violation of California Health and Safety Code section 11360(a), and possession of marijuana for sale in violation of California Health and Safety Code section 11359. As to all counts, it was further alleged Petitioner suffered a prior serious or violent felony conviction within the meaning of the state's "Three Strikes Law" set forth in California Penal Code sections 667(b)-(i) (legislative version) and 1170.12(a)-(e) (initiative version). Petitioner pled not guilty and denied all special allegations. Trial was by jury. The jury found Petitioner guilty as charged. Following a bifurcated proceeding on the prior, the court found the prior true, and sentenced Petitioner to state prison for 11 years as follows: the middle term of 5 years on the adult-using-a-minor count, doubled to 10 years under the Three Strikes Law, plus a 1-year enhancement for failing to remain free from custody within the meaning of California Penal Code section 667.5(b).

The California Court of Appeal (No. B094905) affirmed the judgment of conviction, but reversed on insufficiency

grounds the trial court's true finding on the prior. The Court of Appeal remanded for resentencing. Appendix D.

The California Supreme Court reversed the Court of Appeal (No. S055881), holding Respondent could relitigate the truthfulness of Petitioner's prior because double jeopardy principles do not apply to a noncapital sentencing proceeding. Appendix A.

MISSTATEMENT OF FACT

Pursuant to Supreme Court Rule 15(2), Respondent is setting forth here the misstatements of fact included in the Petition.

The Petition urges "the state conceded that it had presented insufficient evidence to sustain the prior felony conviction allegation because it had failed to prove that defendant had used a weapon during the prior offense." Petition, p. 4. The foregoing misstates what actually occurred in this case.

Both at trial and in the opening brief on appeal, Petitioner failed to raise the issue now before this Court. Following appellate briefing by both parties, the California Court of Appeal, on its own motion, asked for additional briefing on the instant issue. At that point the state Attorney General conceded that if under California law (see People v. Equarte, 42 Cal. 3d 456, 459, 465, 229 Cal. Rptr. 116, 722 P.2d 890 (1986)) the District Attorney needed to prove more than what had been proffered at the bifurcated

proceeding on the prior, then the case should be remanded so that the alleged missing proof could be supplied by the District Attorney. In fact, Respondent asked the California Supreme Court to review its decision in Equarte as a preliminary matter, but the court elected not to do so. Thus, it is a misstatement of fact to say that Respondent "conceded" that the evidence was insufficient as to Petitioner's prior. Opposition, Appendix B through E.

Further, the Petition urges "the opinions below recognized" that "trial on the prior conviction enhancement at issue here has every hallmark of trial." Petition, p. 8. That is not entirely true. Indeed, the California Supreme Court's plurality opinion states, "despite some common procedural protections, the sentencing proceeding here and that in Bullington [Bullington v. Missouri, 451 U.S. 430] are more unlike than alike." Monge, 16 Cal. 4th at 837. The plurality did state "[o]n its face, a section 1025 trial at which a California jury determines the truth of a prior conviction allegation also has 'the hallmarks of the trial on guilt or innocence.'" Id. at 836. The plurality further stated, however, "we believe Bullington's 'hallmarks of the trial' analysis does not apply here." Ibid.

SUMMARY OF REASONS FOR DENYING THE PETITION

In Caspari v. Bohlen, 510 U.S. 383, 114 S. Ct. 948, 127 L. Ed. 2d 236 (1994), this Court held the retroactivity principles of Teague v. Lane, 489 U.S. 288, 109 S. Ct. 1060,

103 L. Ed. 2d 334 (1989), barred a federal court from ruling on the merits of the question presented here. Caspari, 510 U.S. at 389, 393. Thus, the California Supreme Court's decision in this case will not create any problem on federal habeas corpus.

Further, Bullington v. Missouri, 451 U.S. 430, 101 S. Ct. 1852, 68 L. Ed. 2d 270 (1981), and Arizona v. Rumsey, 467 U.S. 203, 104 S. Ct. 2305, 81 L. Ed. 2d 164 (1984), did not overrule the general rule that federal double jeopardy principles do not apply to sentencing. Caspari, 510 U.S. at 391-93, 395-97; Schiro v. Farley, 510 U.S. 222, 231, 114 S. Ct. 783, 127 L. Ed. 2d 47 (1994); Pennsylvania v. Goldhammer, 474 U.S. 28, 30, 106 S. Ct. 353, 88 L. Ed. 2d 183 (1985); see Bullington, 451 U.S. at 438; United States v. DiFrancesco, 449 U.S. 117, 133, 137-38, 101 S. Ct. 426, 66 L. Ed. 2d 328 (1980); North Carolina v. Pearce, 395 U.S. 711, 719-23, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969).

Given the foregoing, certiorari should not be granted because Petitioner fails to raise an important question of federal law that should be addressed in this case. See Monge, 16 Cal. 4th at 831-43.

ARGUMENT

I.

THE PETITION SHOULD BE DENIED BECAUSE THE QUESTION PRESENTED WILL NEVER COME UP ON FEDERAL HABEAS CORPUS

Caspari states:

> While our cases may not have foreclosed the application of the Double Jeopardy Clause to noncapital sentencing, neither did any of them apply the Clause in that context. On the contrary Goldhammer and Strickland [Strickland v. Washington, 466 U.S. 668 (1984)] strongly suggested that Bullington was limited to capital sentencing. We therefore conclude that a reasonable jurist reviewing our precedents at the time of respondent's conviction and sentence became final would not have considered the application of the Double Jeopardy Clause to a noncapital sentencing proceeding to be dictated by our precedents.

Caspari, 510 U.S. at 393 (citation omitted).

Given Caspari, the question presented here will never come up on federal habeas corpus. That being true, there is no reason to grant the writ here, except to reaffirm the general rule that double jeopardy does not apply to noncapital sentencing. Schiro, 510 U.S. at 231. A contrary ruling would unnecessarily impose a new burden on the States. "Constitutional law is not the exclusive province of the federal courts[.]" Caspari, 510 U.S. at 395.

II.

THE PETITION SHOULD BE DENIED BECAUSE BULLINGTON DID NOT CREATE A NEW RULE APPLICABLE TO NONCAPITAL SENTENCING PROCEEDINGS HELD IN STATE COURT

If Bullington, 451 U.S. 430, had created a rule applicable to the States in noncapital sentencing proceedings, this Court obviously would have said so in Caspari, 510 U.S. 383. Caspari said, "Bullington and Rumsey were capital cases, and our reasoning in those cases was based largely on the unique circumstances of a capital sentencing proceeding." Caspari, 510 U.S. at 392; see Schiro, 510 U.S. at 231; Monge, 16 Cal. 4th at 837-38.

The foregoing makes sense given this Court has consistently noted the unique circumstances confronted by someone facing the penalty of death. Booth v. Maryland, 482 U.S. 496, 504, 509 n.12, 107 S. Ct. 2529, 96 L. Ed. 2d 440 (1987), overruled on another point in Payne v. Tennessee, 501 U.S. 808, 811, 817-30, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991); see Buchanan v. Kentucky, 483 U.S. 402, 419-20, 107 S. Ct. 2906, 97 L. Ed. 2d 336 (1987). This Court has said the degree of federal constitutional protection which may be afforded to an accused may properly turn on whether the proceeding is capital versus noncapital. Caspari, 510 U.S. at 393; Schiro, 510 U.S. at 231; Pennsylvania v. Goldhammer, 474 U.S. 28, 30, 114 S. Ct. 955, 127 L. Ed. 2d 247 (1985); see Gilmore v. Taylor, 508 U.S. 333, 342, 113 S. Ct. 2112, 124 L. Ed. 2d 306 (1993); Lowenfield v. Phelps, 484 U.S. 231, 238-39,

108 S. Ct. 546, 98 L. Ed. 2d 568 (1988); Rummel v. Estelle, 445 U.S. 263, 272, 100 S. Ct. 1133, 63 L. Ed. 2d 382 (1980).

Given the above, it makes sense that a majority of the justices of the Supreme Court of California held the federal double jeopardy clause does not apply here. Indeed, the California Supreme Court's plurality opinion in this case discusses many of this Court's decisions cited above, as well as notes the distinguishing characteristics between a truthfulness proceeding under California law versus the penalty phase proceeding at issue in Bullington. See Monge, 16 Cal. 4th at 832-43.

Citing this Court's precedent, the plurality opinion here noted "in the absence of a statutory provision, a criminal defendant is not entitled as a federal constitutional matter to a trial, formal or informal, of sentencing issues, even when the sentence turns on factual determinations such as the existence of prior convictions." Monge, 16 Cal. 4th at 832-33.

The plurality opinion reasons:

> Because, in a noncapital case, a state need not provide a trial of sentencing allegations *at all*, a state that elects to provide a trial of these allegations can circumscribe the procedural boundaries of that trial. So long as the state affords minimal due process of law, it need not provide all the procedural guaranties that characterize a trial on guilt or innocence. Thus, a state that provides a trial of sentencing allegations

> need not provide a jury trial. [Citations.] For the same reason, a state that provides a trial of sentencing allegations arguably need not provide double jeopardy protection.

Monge, 16 Cal. 4th at 833 (emphasis in original). The foregoing appears to pass constitutional muster under this Court's precedent.

The plurality opinion notes the federal Double Jeopardy Clause "makes no express reference to sentencing determinations[,]" and notes this Court has been "reluctant to apply the clause to sentencing determinations." Monge, 16 Cal. 4th at 834. The state high court opined Bullington "marked the first departure from this consistent approach[,]" but that in its opinion "Bullington's 'hallmarks of the trial' analysis does not apply here." Monge, 16 Cal. 4th at 835-36. Respondent agrees.

Many of the procedural protections that applied to Petitioner rested on statutory, not federal constitutional, grounds. See Monge, 16 Cal. 4th at 833-34, 837. This is relevant because "[m]any of the elaborate procedures at the penalty phase of a capital trial originate directly in [this Court]'s decisions interpreting the federal Constitution." Monge, 16 Cal. 4th at 837. Thus,

> when a state legislature has elected *at its option* to provide a trial-like proceeding to resolve a factual issue that a judge could otherwise resolve with no hearing at all, common sense suggests that the

> legislature need not provide all the procedural protections that apply in a constitutionally mandated trial.

Monge, 16 Cal. 4th at 837 (emphasis in original).

The plurality opinion reasoned there are three compelling ways in which "despite some common procedural protections, the sentencing proceeding here and that in Bullington are more unlike than alike." Monge, 16 Cal. 4th at 837.

First, "the trial-like procedures that regulate imposition of the death penalty find no parallel in noncapital cases." Monge, 16 Cal. 4th at 837. For instance, unlike the death penalty sentencing procedure at issue in Bullington, a proceeding on a prior conviction allegation held pursuant to California Penal Code section 1025 "does not require the trier of fact to determine the existence of a broad range of aggravating and mitigating circumstances relating to the defendant's character." Monge, 16 Cal. 4th at 837. Indeed, a noncapital proceeding under California law "does not require a finding that the aggravating circumstances warrant a longer sentence or a weighing of aggravating circumstances against mitigating circumstances." Ibid. Also, a noncapital proceeding under California law does not allow the trier of fact to "reject a longer sentence even if its factual determinations support the sentence." Ibid.

Second, "the financial and emotional burdens of the sentencing proceeding at issue in Bullington distinguishes

Bullington from this case." Monge, 16 Cal. 4th at 838. Bullington stressed the embarrassment, expense, ordeal, anxiety and insecurity faced by one facing death at a penalty phase are equivalent to that faced by any defendant at the guilt phase of a criminal trial. Bullington, 451 U.S. at 445; see Monge, 16 Cal. 4th at 838. Here, though a proceeding on the truth of a prior may be important to Petitioner, it must be remembered that at this point he has already been found guilty on the substantive crime. Thus, the level of his embarrassment, expense, ordeal, anxiety and insecurity at a retrial on the prior is not "equivalent" to that faced at the guilt phase of a trial. Monge, 16 Cal. 4th at 838; see Goldhammer, 474 U.S. at 30.

Indeed, a retrial on the prior is not a prosecution of an additional criminal offense; rather it is "merely a determination, for purposes of punishment, of the defendant's *status*, which, like age or gender, is readily determinable from the public record." Monge, 16 Cal. 4th at 838 (emphasis in original); see Caspari, 510 U.S. at 396 ("Persistent-offender status is a fact objectively ascertainable on the basis of readily available evidence").

> [W]hen, as here, the court has bifurcated the prior conviction issue, the defendant begins the prior conviction trial having already suffered the embarrassment of the present conviction. The marginal increase in embarrassment attributable to the prior

> conviction trial is not comparable to the embarrassment of an unproved criminal charge.

Monge, 16 Cal. 4th at 838. A retrial on the prior "is simple and straightforward as compared to the guilt phase of a criminal trial." Ibid. "Often it involves only the presentation of a certified copy of the prior conviction along with the defendant's photograph and fingerprints. In many cases, defendant offers no evidence at all, and the outcome is relatively predictable." Ibid. The plurality opinion notes,

> In this case, for example, the prior conviction trial, which looked more like an informal hearing than a trial, fills only a few pages of a 244-page reporter's transcript. This abbreviated proceeding, at which the prosecution presented only documentary evidence and defendant presented no evidence, is hardly comparable to the penalty phase of a capital trial, which was the trial-like proceeding at issue in Bullington.

Monge, 16 Cal. 4th at 838. Respondent agrees. See Caspari, 510 U.S. at 392-93, 396; Schiro, 510 U.S. at 231; Goldhammer, 474 U.S. at 30; Strickland v. Washington, 466 U.S. 668, 686-87, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

Finally, "the nature of the issues involved at the penalty phase of a capital trial distinguishes Bullington from this case." Monge, 16 Cal. 4th at 839. In a capital case, the penalty determination "necessarily depends" on the specific facts of the defendant's present substantive offense. Ibid. At a trial on a prior, however, "the factual

determinations are generally divorced from the facts of the present offense, and the evidence does not overlap" or supplement the evidence offered at the guilt phase of the trial. Ibid. Simply put, a trial on a prior "merely determines a question of the defendant's continuing status, irrespective of the present offense, and the prosecution may reallege and retry that status in as many successive cases as it is relevant [citations], even if a prior jury has rejected the allegation [citation]." Monge, 16 Cal. 4th at 839; see Caspari, 510 U.S. at 396; see also Rummel, 445 U.S. at 268, 274, 284-85.

Given the foregoing distinctions, it is clear the California Supreme Court has properly held the Double Jeopardy Clause of the United States Constitution does not apply to noncapital sentencing proceedings. Monge, 16 Cal. 4th at 831-43. Indeed, the California Supreme Court also held the Double Jeopardy Clause of the California Constitution does not apply here. Id. at 243-45.

"Constitutional law is not the exclusive province of the federal courts[.]" Caspari, 510 U.S. at 395. Further, constitutional law "does not grow inevitably by accretion; rather, each question rises or falls on its individual merits." Monge, 16 Cal. 4th at 834. "Considering the breadth and subjectivity of the factual determinations at issue in Bullington, the failure of proof at issue in that case was more like an acquittal at the guilt phase of a criminal trial than is the failure of proof at issue here." Ibid.

Accordingly, for the above reasons, while granting certiorari would be unwarranted, it is clear the plurality opinion of the California Supreme Court in this case passes constitutional scrutiny by this Court.

CONCLUSION

Since the California Supreme Court fairly decided this case in accord with the decisions of this Court, the petition for writ of certiorari should be denied.

Dated: December 16, 1997.

Respectfully submitted,

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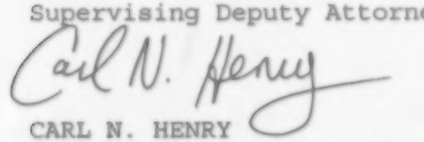

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APPENDIX A

Second Appellate District, Division Three No. B094905
S055881

IN THE SUPREME COURT OF CALIFORNIA

SUPREME COURT
FILED
OCT 30 1996
Robert Wandruff Clerk
DEPUTY

PEOPLE, Respondent

v.

ANGEL JAIME MONGE, Appellant

Petition for review GRANTED.

George
Chief Justice

Kennard
Associate Justice

Baxter
Associate Justice

Werdegar
Associate Justice

Brown
Associate Justice

Associate Justice

Associate Justice

COPY

SUPREME COURT
FILED
AUG 27 1997
Robert Wandruff Clerk

IN THE SUPREME COURT OF CALIFORNIA

DOCKET
CR. LA.
8-24-2024
9-4-97

THE PEOPLE, Plaintiff and Respondent, v. ANGEL JAIME MONGE, Defendant and Appellant.	)	S055881 Ct. App. 2/3 B094905 Los Angeles County Super. Ct. No. KA025876

In this case, we consider the applicability of the state and federal prohibitions against double jeopardy to a proceeding to determine the truth of a prior conviction allegation. We conclude that, in this noncapital case, the state and federal prohibitions against double jeopardy do not apply. Accordingly, we reverse the judgment of the Court of Appeal to the extent that judgment bars retrial of the prior conviction allegation on double jeopardy grounds.

FACTS AND PROCEDURAL BACKGROUND

During the afternoon of January 25, 1995, as Pomona Police Department undercover officers were driving an unmarked car on West Ninth Street in the City of Pomona, they spotted a 13-year-old boy standing near the curb. The boy motioned the officers to pull over, but instead they pulled into an alley that led to the rear of an apartment complex where police had earlier observed narcotics activity. Once in the carport area at the rear of the complex, the officers spotted defendant Angel Jaime Monge. Defendant approached the car, and one of the officers rolled down the window and asked where he could buy marijuana. Defendant did not answer, but

SEE CONCURRING AND DISSENTING OPINIONS

walked to a carport. The officers turned their car around and then noticed the young boy who had earlier motioned them to pull over, now standing some distance behind their car. Defendant returned and gave the boy several plastic bags. The boy then approached the officers and asked how much they wanted. The officers requested two "dime bags" and exchanged two $10 bills for two plastic bags of marijuana. After leaving the alley, the officers reported the sale to other Pomona officers, who arrested defendant and the boy. Police searched defendant and found the two $10 bills that the officers had given to the boy.

The District Attorney of Los Angeles County charged defendant with using a minor to sell marijuana (Health & Saf. Code, § 11361, subd. (a)), sale or transportation of marijuana (Health & Saf. Code, § 11360, subd. (a)), and possession of marijuana for sale (Health & Saf. Code, § 11359). The district attorney also alleged defendant had suffered a prior serious felony conviction within the meaning of the "Three Strikes" law (Pen. Code, §§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)),[1] and a prior prison term within the meaning of section 667.5, subdivision (b). Specifically, the district attorney alleged a July 2, 1992, conviction and prison term for assault with a deadly weapon (§ 245, subd. (a)(1)). Defendant pleaded not guilty and denied all sentencing allegations.

Defendant waived his right to a jury trial of the prior conviction and prior prison term allegations, and the court granted his request to bifurcate determination of those allegations. A jury found defendant guilty of the substantive charges. When proceedings reconvened the following week, the court asked defense counsel if defendant wanted to admit the prior conviction, and defense counsel said, "That's correct, Your Honor." The court then asked defendant if he understood, and defendant said, "Yes." After an off-the-record discussion, the court again asked if

1 All further statutory references are to the Penal Code.

defendant wanted to admit the prior conviction, and defense counsel said, "No, he doesn't. He wishes the court to try the prior without the jury."

The prosecutor asserted that the prior assault conviction was a serious felony for purposes of the Three Strikes law. Defense counsel disagreed, arguing the weapon involved in the prior crime was not a deadly weapon. The court interrupted to point out that defendant had pleaded guilty to assault with "a deadly weapon" and thus had admitted the weapon was deadly. The court stated it would take judicial notice of the prior conviction and asked if the parties submitted the matter on that evidence alone. The prosecution then offered as additional evidence a "prison packet" (see § 969b) dated February 17, 1995, and an abstract of judgment. This additional evidence characterized defendant's prior conviction as "PC 245(a)(1) ADW GBI" and "ASLT W/DW (245(a)(1)PC)." Defense counsel submitted the matter after questioning whether the prosecution's documentary evidence, which included a photograph and fingerprints, related to defendant.

The court found true that defendant suffered a prior serious felony conviction, "[t]he felony being personal use of a deadly weapon in violation [of] section 245, 245(a)(1)." The court also found true the prior prison term allegation. The court imposed an eleven-year sentence, including five years for using a minor to sell marijuana, which the court doubled to ten years under the Three Strikes law (§§ 667, subd. (e)(1), 1170.12, subd. (c)(1)), plus a one-year enhancement for the prior prison term (§ 667.5, subd. (b)) and two years to run concurrently for possessing marijuana for sale. Under section 654, the court stayed the sentence for defendant's conviction of selling marijuana.

On appeal, defendant challenged the Three Strikes law as a violation of his right to due process. On its own motion, the Court of Appeal requested supplemental briefing on whether sufficient evidence supported the trial court's finding that defendant had suffered a prior serious felony conviction within the meaning of the Three Strikes law. Under the Three Strikes law, a prior felony conviction may affect

the sentence for the present offense if the conviction was of a "serious felony" as defined in section 1192.7, subdivision (c). (§§ 667, subd. (d)(1), 1170.12, subd. (b)(1).) Of the felonies and categories of felonies listed in section 1192.7, subdivision (c), defendant's July 2, 1992, felony conviction might have qualified as a "serious felony" under either subdivision (c)(8), which refers to "any . . . felony in which the defendant *personally* inflicts great bodily injury on any person, other than an accomplice . . . ," or subdivision (c)(23), which refers to "any felony in which the defendant *personally* used a dangerous or deadly weapon." (Italics added.)

The Court of Appeal affirmed defendant's conviction, but reversed the trial court's true finding on the prior serious felony allegation, holding the evidence insufficient to establish that defendant had acted personally. In addition, the Court of Appeal held that the state and federal constitutional protections against double jeopardy barred retrial of the prior serious felony allegation. Thus, the Court of Appeal remanded for resentencing.

We granted review in order to consider whether the state and federal prohibitions against double jeopardy apply to a proceeding, in a noncapital case, to determine the truth of a prior serious felony allegation.

DOUBLE JEOPARDY

Federal Constitution

The Fifth Amendment of the United States Constitution provides that "[n]o person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb . . . ." Among other things, this constitutional guaranty, known as the double jeopardy clause, "protects against a second prosecution for the same offense after acquittal." (*North Carolina* v. *Pearce* (1969) 395 U.S. 711, 717 (*Pearce*), fn. omitted.) In *Benton* v. *Maryland* (1969) 395 U.S. 784, 796, the Supreme Court held that the double jeopardy prohibition was " 'fundamental to the American scheme of justice' " and therefore enforceable against the states as an element of the due process protection embodied in the Fourteenth Amendment. Nevertheless, the Supreme

Court has never held that the double jeopardy clause applies generally to proceedings, like the one in this case, to determine whether a defendant should receive a longer sentence because of prior convictions. We have on a few occasions noted and expressly declined to decide this question. (*People* v. *Valladoli* (1996) 13 Cal.4th 590, 608; *People* v. *Wiley* (1995) 9 Cal.4th 580, 593, fn. 8; *People* v. *Saunders* (1993) 5 Cal.4th 580, 593.)

At the outset we emphasize that, in the absence of a statutory provision, a criminal defendant is not entitled as a federal constitutional matter to a trial, formal or informal, of sentencing issues, even when the sentence turns on factual determinations such as the existence of prior convictions. In *Williams* v. *New York* (1949) 337 U.S. 241 (*Williams*), a jury convicted the defendant of first degree murder and recommended life imprisonment. (*Id.* at pp. 242-243.) The judge, however, sentenced the defendant to death after considering the evidence "in the light of additional information obtained through the court's 'Probation Department, and through other sources.' " (*Id.* at p. 242.) Among other things, the judge noted that the defendant had been involved in " 'thirty . . . burglaries in and about the same vicinity.' " (*Id.* at p. 244.) No court had ever convicted the defendant of these 30 burglaries, but "the judge had information that [the defendant] had confessed to some and had been identified as the perpetrator of some of the others." (*Ibid.*) The judge's rather informal fact-finding procedure was consistent with applicable New York law, which permitted the sentencing court to " 'seek any information that will aid the court' " (*id.* at p. 243), including information "obtained outside the courtroom from persons whom a defendant has not been permitted to confront or cross-examine" (*id.* at p. 245).

The United States Supreme Court upheld the sentence. The high court noted that the procedural protections applicable in a trial on guilt (notice of the charges, opportunity to cross-examine adverse witnesses, opportunity to offer evidence, and representation by counsel) traditionally have not applied at sentencing. (*Williams,*

supra, 337 U.S. at pp. 245-246.) Historically, the court pointed out, sentencing judges could even rely on their personal knowledge of a defendant. (*Id.* at p. 246.) The court concluded, "The due process clause should not be treated as a device for freezing the evidential procedure of sentencing in the mold of trial procedure." (*Id.* at p. 251.)

The high court has broadly described *Williams* as holding "that the Due Process Clause of the Fourteenth Amendment [does] not require a judge to have hearings and to give a convicted person an opportunity to participate in those hearings when he [comes] to determine the sentence to be imposed." (*Specht* v. *Patterson* (1967) 386 U.S. 605, 606. Moreover, though the high court has retreated from *Williams* in capital cases (*Gardner* v. *Florida* (1977) 430 U.S. 349), it has otherwise reaffirmed *Williams* as recently as last term. (*U.S.* v. *Watts* (1997) ___ U.S. ___, ___ [117 S.Ct. 633, 635]; see also *Witte* v. *U.S.* (1995) ___ U.S. ___, ___ [115 S.Ct. 2199, 2205] ["[T]he Due Process Clause [does] not require 'that courts throughout the Nation abandon their age-old practice of seeking information from out-of-court sources to guide their judgment toward a more enlightened and just sentence.' "].)

Because, in a noncapital case, a state need not provide a trial of sentencing allegations *at all*, a state that elects to provide a trial of these allegations can circumscribe the procedural boundaries of that trial. So long as the state affords minimal due process of law, it need not provide all the procedural guaranties that characterize a trial on guilt or innocence. Thus, a state that provides a trial of sentencing allegations need not provide a jury trial. (*People* v. *Vera* (1997) 15 Cal.4th 269, 274, 277; *People* v. *Wims* (1995) 10 Cal.4th 293, 304-306; *People* v. *Wiley*, *supra*, 9 Cal.4th at pp. 584-585, 589.) For the same reason, a state that provides a trial of sentencing allegations arguably need not provide double jeopardy protection.

Though states need not provide a trial of sentencing allegations, the California Legislature has elected to grant defendants a statutory right to a jury trial of prior conviction allegations. Section 1025 provides: "[T]he question whether or not [a defendant] has suffered [a] previous conviction must be tried by the jury which tries the issue upon the plea of not guilty, or in case of a plea of guilty, by a jury impaneled for that purpose . . . ." A survey of our decisions indicates that we have expanded section 1025's bare grant of a jury trial to include various procedural guaranties. For example, we have stated in dictum that the prosecution must prove a prior conviction allegation beyond a reasonable doubt (*People* v. *Tenner* (1993) 6 Cal.4th 559, 566 (*Tenner*); *In re Yurko* (1974) 10 Cal.3d 857, 862) and that the accused enjoys the privilege against self-incrimination (*In re Yurko*, *supra*, 10 Cal.3d at p. 863, fn. 5). Similarly, we have held that the rules of evidence apply in these trials. (*People* v. *Reed* (1996) 13 Cal.4th 217, 224; *People* v. *Myers* (1993) 5 Cal.4th 1193, 1201.) Finally, we have stated that a defendant in a trial of a prior conviction allegation has a right to " 'be confronted with witnesses against him [and] to cross-examine' " those witnesses. (*People* v. *Reed*, *supra*, 13 Cal.4th at p. 228, fn. 6, quoting *Specht* v. *Patterson*, *supra*, 386 U.S. at p. 610; *In re Yurko*, *supra*, 10 Cal.3d at p. 863, fn. 5.) Arguably, the next step in the logical progression of these decisions is for us now to hold that the constitutional protections against double jeopardy apply. Constitutional law, however, does not grow inevitably by accretion; rather, each question rises or falls on its individual merits.

With this point in mind, we turn to an analysis of the double jeopardy clause of the federal Constitution. The double jeopardy clause by its terms proscribes a second jeopardy "for the same *offense*." (U.S. Const., 5th Amend., italics added.) The clause makes no express reference to sentencing determinations. Our review of the Supreme Court's decisions indicates that court is reluctant to apply the clause to sentencing determinations. In *Stroud* v. *United States* (1919) 251 U.S. 15 (*Stroud*), a jury found the defendant guilty of first degree murder " 'without capital

punishment,' " which was one of its options under the applicable statute. (*Id.* at pp. 17, 18.) After the Supreme Court reversed that judgment, a jury on retrial convicted the defendant of first degree murder, but omitted the stipulation against capital punishment, and the trial court sentenced the defendant to death. (*Id.* at p. 17.) The Supreme Court held that the defendant had not been "placed in second jeopardy" despite the change in his sentence from life imprisonment to death. Specifically, the court did not consider the verdict of "guilty . . . 'without capital punishment'." as a conviction of a lesser offense. "The fact that the jury may thus mitigate the punishment to imprisonment for life did not render the conviction less than one for first degree murder." (*Id.* at p. 18.)

The Supreme Court reaffirmed *Stroud* in *Pearce*, *supra*, 395 U.S. at page 720. In *Pearce*, the court resolved two cases in which the defendants successfully challenged their convictions, only to receive longer overall sentences following retrials. Moreover, neither defendant received credit for time served. (*Id.* at pp. 713-715.) The Supreme Court held that the double jeopardy clause entitled the defendants to credit for time served. (*Id.* at pp. 718-719.) Nevertheless, the double jeopardy clause did not preclude the court from imposing a longer sentence after retrial. "Long-established constitutional doctrine makes clear that [with the exception of credit for time served] the guarantee against double jeopardy imposes no restrictions upon the length of a sentence imposed upon reconviction." (*Id.* at p. 719.)

In *Chaffin* v. *Stynchcombe* (1973) 412 U.S. 17, 23-24, in which the jury imposed the sentence instead of the judge, the Supreme Court, without discussion, again reaffirmed that the double jeopardy clause does not preclude a longer sentence following retrial. Finally, in *United States* v. *DiFrancesco* (1980) 449 U.S. 117 (*DiFrancesco*), the high court considered a statutory sentencing scheme that allowed the federal court of appeals to review the sentence that the federal district court had imposed and, at the prosecution's request, to increase that sentence "after considering the record" and "after hearing." (*Id.* at p. 120, fn. 2.) The high court determined that

this scheme did not violate the double jeopardy clause, noting that "[h]istorically, the pronouncement of sentence has never carried the finality that attaches to an acquittal." (*Id.* at p. 133.)

Thus, in a variety of contexts, the Supreme Court has declined to extend the federal guaranty against double jeopardy to sentencing proceedings. *Bullington* v. *Missouri* (1981) 451 U.S. 430 (*Bullington*) marked the first departure from this consistent approach.

Bullington concerned imposition of the death penalty under Missouri law. In accord with the Supreme Court's decisions in *Furman* v. *Georgia* (1972) 408 U.S. 238, *Gregg* v. *Georgia* (1976) 428 U.S. 153, and the capital cases decided on the same day as *Gregg*, Missouri's death penalty statute included intricate procedural safeguards. For example, the trial court had to conduct a separate presentence hearing for a defendant convicted of capital murder. The hearing had to be held before the same jury that found the defendant guilty. At the hearing, the jury considered additional evidence and determined whether any aggravating or mitigating circumstances existed, whether the aggravating circumstances warranted the death penalty, and whether the mitigating circumstances outweighed the aggravating circumstances. The jury had to make its findings beyond a reasonable doubt. Finally, the court had to instruct the jury that it need not impose the death penalty even if it found sufficient aggravating circumstances that mitigating circumstances did not outweigh. (*Bullington*, *supra*, 451 U.S. at pp. 433-435.)

A Missouri jury convicted Robert Bullington of capital murder. As required, the court held a presentence hearing, and the jury returned a verdict of "imprisonment for life without eligibility for probation or parole for 50 years." (*Bullington*, *supra*, 451 U.S. at p. 436.) The trial court then granted Bullington's motion for a new trial, finding error in jury selection. Despite the Supreme Court's decision in *Stroud*, *supra*, 251 U.S. 15, the court also ruled, on double jeopardy grounds, that the prosecution could not seek the death penalty on retrial. (*Bullington*, *supra*, 451 U.S.

at p. 436.) The prosecution petitioned for a writ of prohibition or mandamus, and the state supreme court granted the writ, holding that double jeopardy principles did not bar the prosecution from seeking the death penalty. (*Id.* at pp. 436-437.) The United States Supreme Court reversed, holding that the double jeopardy clause did bar imposition of the death penalty. (*Id.* at pp. 446-447.) Noting that, under the applicable Missouri death penalty law, the jury determined the sentence at "a separate hearing" and did not have "unbounded discretion," but rather chose "between two alternatives," and that "the prosecution . . . undertook the burden of establishing certain facts beyond a reasonable doubt" (*id.* at p. 438), the high court reasoned that the penalty phase of a Missouri capital trial had "the hallmarks of the trial on guilt or innocence" (*id.* at p. 439) and therefore that the double jeopardy prohibition applied (*id.* at pp. 438, 446). The court reaffirmed *Bullington* in *Arizona* v. *Rumsey* (1984) 467 U.S. 203, 212, a case in which the judge, not the jury, determined the appropriate sentence.

On its face, a section 1025 trial at which a California jury determines the truth of a prior conviction allegation also has "the hallmarks of the trial on guilt or innocence." Thus, the defendant has a right to counsel, notice, and an opportunity to be heard. (*Oyler* v. *Boles* (1962) 368 U.S. 448, 452.) The prosecution must "plead and prove" the prior conviction allegation (§§ 667, subds. (c) and (g), 1170.12, subds. (a) and (e)) at a "trial" (§ 1025). The prosecution has the burden of proof beyond a reasonable doubt. (*Tenner*, *supra*, 6 Cal.4th at p. 566.) Finally, the trier of fact faces a choice between two alternatives. (§ 1158.) Nevertheless, for reasons we discuss below, we believe *Bullington*'s "hallmarks of the trial" analysis does not apply here.

Significantly, the high court in subsequent cases has suggested that *Bullington* does not apply to noncapital cases. For example, in *Pennsylvania* v. *Goldhammer* (1985) 474 U.S. 28, the court reaffirmed that its decisions " 'clearly establish that a sentenc[ing *in a noncapital case*] does not have the qualities of constitutional finality that attend an acquittal.' " (*Id.* at p. 30, bracketed language in *Goldhammer*, italics

added.) Similarly, in *Caspari* v. *Bohlen*, the court noted that *Bullington* "was based largely on the unique circumstances of a capital sentencing proceeding." (*Caspari* v. *Bohlen* (1994) 510 U.S. 383, 392 (*Caspari*).) The court added: "*Goldhammer* and *Strickland* [v. *Washington* (1984) 466 U.S. 668] strongly suggested that *Bullington* was limited to capital sentencing." (*Caspari*, *supra*, 510 U.S. at p. 393.)

Moreover, many of the procedural protections that apply in a section 1025 trial rest on statutory, not federal constitutional, grounds. On the other hand, many of the elaborate procedures at the penalty phase of a capital trial originate directly in the Supreme Court's decisions interpreting the federal Constitution. This distinction is relevant to our analysis because, when a state legislature has elected *at its option* to provide a trial-like proceeding to resolve a factual issue that a judge could otherwise resolve with no hearing at all, common sense suggests that the legislature need not provide all the procedural protections that apply in a constitutionally mandated trial.

Furthermore, despite some common procedural protections, the sentencing proceeding here and that in *Bullington* are more unlike than alike. First, the trial-like procedures that regulate imposition of the death penalty find no parallel in noncapital cases. Unlike the death penalty sentencing procedure at issue in *Bullington*, a trial of prior conviction allegations under section 1025 does not require the trier of fact to determine the existence of a broad range of aggravating and mitigating circumstances relating to the defendant's character. A section 1025 trial does not then require a finding that the aggravating circumstances warrant a longer sentence or a weighing of aggravating circumstances against mitigating circumstances. Nor does a section 1025 trial allow the trier of fact to reject a longer sentence even if its factual determinations support the sentence. Considering the breadth and subjectivity of the factual determinations at issue in *Bullington*, the failure of proof at issue in that case was more like an acquittal at the guilt phase of a criminal trial than is the failure of proof at issue here.

In deciding *Bullington*, the court reaffirmed the general rule that the double jeopardy clause does not apply to sentencing proceedings. (*Bullington*, *supra*, 451 U.S. at p. 438.) The court then carved out a narrow exception to this general rule. (*Ibid.*) The court did not overrule *Stroud*, *supra*, 251 U.S. 15, which also involved imposition of the death penalty. Rather, it distinguished *Stroud* on the basis of the procedural safeguards that arise from modern death penalty jurisprudence. (*Bullington*, *supra*, 451 U.S. at p. 446.) Most of those procedural safeguards are unique to death penalty determinations and simply do not apply here.

Second, the financial and emotional burden of the sentencing proceeding at issue in *Bullington* distinguishes *Bullington* from this case. The court in *Bullington* stressed that "[t]he 'embarrassment, expense and ordeal' and the 'anxiety and insecurity' faced by a defendant at the penalty phase of a Missouri capital murder trial surely are at least equivalent to that faced by any defendant at the guilt phase of a criminal trial." (*Bullington*, *supra*, 451 U.S. at p. 445.) By comparison, though a trial of prior conviction allegations is undoubtedly *important* to a defendant—possibly increasing a short prison term to a life term—the level of embarrassment, expense, and anxiety involved is not "equivalent to that faced . . . at the guilt phase" of the trial. (*Ibid.*) This lesser financial and emotional burden exists even when the prior conviction trial may substantially increase the length of the sentence.

The trial is not a prosecution of an additional criminal offense carrying the stigma associated with a criminal charge; rather it is merely a determination, for purposes of punishment, of the defendant's *status*, which, like age or gender, is readily determinable from the public record. Moreover, when, as here, the court has bifurcated the prior conviction issue, the defendant begins the prior conviction trial having already suffered the embarrassment of the present conviction. The marginal increase in embarrassment attributable to the prior conviction trial is not comparable to the embarrassment of an unproved criminal charge. Finally, a prior conviction trial is simple and straightforward as compared to the guilt phase of a criminal trial. Often

it involves only the presentation of a certified copy of the prior conviction along with the defendant's photograph and fingerprints. In many cases, defendants offer no evidence at all, and the outcome is relatively predictable. In this case, for example, the prior conviction trial, which looked more like an informal hearing than a trial, fills only a few pages of a 244-page reporter's transcript. This abbreviated proceeding, at which the prosecution presented only documentary evidence and defendant presented no evidence, is hardly comparable to the penalty phase of a capital trial, which was the trial-like proceeding at issue in *Bullington*.

Even when, as here, the prior conviction trial involves some factual point relating to the prior crime, such as whether the defendant acted personally, the proceeding is not like "the trial on guilt" (*Bullington*, *supra*, 451 U.S. at p. 439), because the prosecution may only present evidence from the *record* of the prior conviction (*People* v. *Guerrero* (1988) 44 Cal.3d 343, 355 (*Guerrero*)). The defendant, and any member of the public, can review that record before the prior conviction trial and accurately forecast the trial's outcome. When a trial, even a very important trial, is short and readily predictable in this way, the defendant suffers correspondingly less embarrassment, expense, and anxiety. Significantly, the defendant does not need to sit for weeks or months while witnesses describe in detail to a jury and the public the specifics of his alleged unlawful activities. For these reasons, we conclude the financial and emotional burden of a prior conviction trial is minor as compared to a guilt trial. (Cf. *DiFrancesco*, *supra*, 449 U.S. at p. 136 ["The defendant's primary concern and anxiety obviously relate to the determination of innocence or guilt, and that already is behind him."].)

Third, the nature of the issues involved at the penalty phase of a capital trial distinguishes *Bullington* from this case. The sentence determination in a capital case necessarily depends on the specific facts of the defendant's present crime, as well as an overall assessment of the defendant's character. The evidence usually overlaps or supplements the evidence offered at the guilt phase of the trial. On the other hand, in

a trial of a prior conviction allegation, the factual determinations are generally divorced from the facts of the present offense, and the evidence does not overlap at all. Like a trial in which the defendant's age or gender is at issue, the prior conviction trial merely determines a question of the defendant's continuing status, irrespective of the present offense, and the prosecution may reallege and retry that status in as many successive cases as it is relevant (*People* v. *Biggs* (1937) 9 Cal.2d 508, 512; *People* v. *Dutton* (1937) 9 Cal.2d 505, 507), even if a prior jury has rejected the allegation (*People* v. *Rice* (1988) 200 Cal.App.3d 647, 654-656). If a jury rejects the allegation, it has not acquitted the defendant of his prior conviction status. (*Ibid.*) "A defendant cannot be 'acquitted' of that status any more than he can be 'acquitted' of being a certain age or sex or any other inherent fact." (*Durham* v. *State* (Ind. 1984) 464 N.E.2d 321, 324.)

Given these distinctions, we do not believe *Bullington* requires application of the double jeopardy clause to all sentencing proceedings that have "the hallmarks of the trial on guilt or innocence." (*Bullington, supra,* 451 U.S. at p. 439.) Nevertheless, other state courts and the federal circuit courts are divided as to whether the federal double jeopardy clause applies to proceedings analogous to the one here. Some courts conclude that, where the prior conviction determination involves a trial-like proceeding at which the prosecution has the burden of proving certain disputed facts, a negative finding is tantamount to an acquittal of the facts necessary to establish a longer sentence, and double jeopardy protections bar retrial. (See, e.g., *Bohlen* v. *Caspari* (8th Cir. 1992) 979 F.2d 109, 113, revd. on other grounds in *Caspari*, *supra*, 510 U.S. at pp. 396-397; *Durosko* v. *Lewis* (9th Cir. 1989) 882 F.2d 357, 359; *Briggs* v. *Procunier* (5th Cir. 1985) 764 F.2d 368, 371; *People* v. *Quintana* (Colo. 1981) 634 P.2d 413, 419; *Cooper* v. *State* (Tex.Crim.App. 1982) 631 S.W.2d 508, 513-514; *State* v. *Hennings* (1983) 100 Wn.2d 379, 386-390 [670 P.2d 256, 259-262].) These courts, however, do not fully appreciate the unique nature and constitutional origins of capital sentencing proceedings as compared to

prior conviction proceedings. Accordingly, we find more persuasive those decisions involving noncapital sentencing proceedings in which courts found the federal double jeopardy clause did not apply. (See, e.g., *Carpenter* v. *Chapleau* (6th Cir. 1996) 72 F.3d 1269, 1274 ["We do not believe the Double Jeopardy Clause is implicated in [a persistent felony offender] proceeding."]; *Denton* v. *Duckworth* (7th Cir. 1989) 873 F.2d 144, 148 ["We agree . . . that the habitual offender statute, which does not create a separate offense or require consideration of the underlying facts on the substantive charge, is distinguishable from the statute at issue in *Bullington*, and thus double jeopardy does not attach."]; *Linam* v. *Griffin* (10th Cir. 1982) 685 F.2d 369, 376 [The habitual criminal proceeding "is an inquiry as to whether or not the man standing before the court is the same person who was previously convicted as charged. The jury answers yes or no in accordance with the evidence. This is not the kind of adjudication that is referred to in the fifth amendment."]; *Durham* v. *State*, *supra*, 464 N.E.2d at p. 324 ["The habitual offender status . . . is a continuing status of a particular defendant . . . . The state may use this status any time the defendant commits a further crime and a jury's determination that a defendant is not a habitual offender during a particular trial is not an 'acquittal' of that defendant's status as a habitual offender."]; *State* v. *Cobb* (Mo. 1994) 875 S.W.2d 533, 536 ["The constitutional double jeopardy prohibition does not speak to sentencing except in capital cases."]; *State* v. *Aragon* (1993) 116 N.M. 267, 271 [861 P.2d 948, 952] ["Because our habitual criminal proceedings are not 'prosecutions' of an 'offense' and sentencing does not imply guilt or innocence of any greater crime, . . . double jeopardy does not attach."]; cf. *Wilmer* v. *Johnson* (3d Cir. 1994) 30 F.3d 451, 456 ["[I]n *Bullington*, a capital case, the Court carved out an exception to the general rule that the Double Jeopardy Clause does not apply in the sentencing context."]; *U.S.* v. *Rodriguez-Gonzalez* (2d Cir. 1990) 899 F.2d 177, 181 ["Reliance on . . . *Bullington* is inapposite . . . since [that] case[] arose in the unique context of capital sentencing."]; *People* v. *Levin* (Ill. 1993) 623 N.E.2d 317, 325 ["We conclude that the separate

hearing procedure under our [Habitual Criminal] Act bears insufficient formalities of a trial to render that factor analogous to the separate hearing procedure in *Bullington* and to this defendant's trial on the issue of guilt."]; *People* v. *Sailor* (1985) 65 N.Y.2d 224, 231-236 [480 N.E.2d 701, 708] ["[T]here is a qualitative and quantitative difference between imposition of the death penalty [at issue in *Bullington*] and sentencing as a persistent or second felony offender . . . ."]; but see *Perkins* v. *State* (Ind. 1989) 542 N.E.2d 549, 551-552 [overruling *Durham* v. *State*, *supra*, 464 N.E.2d 321, but relying on a clear misreading of *Lockhart* v. *Nelson* (1988) 488 U.S. 33, 37-38, fn. 6].)

Our conclusion finds some support in the high court's most recent discussion of the issue in *Caspari*, *supra*, 510 U.S. 383. In *Caspari*, as in this case, the state court of appeals reversed a sentence because the record contained insufficient evidence that the defendant was a "persistent offender." (*Id.* at pp. 386-387.) On rema[illegible], the prosecution offered additional evidence, and the trial court imposed the same sentence. The state court of appeals affirmed the sentence, concluding that the federal double jeopardy clause does not apply to sentencing proceedings and therefore did not bar retrial of the persistent offender issue. (*State* v. *Bohlen* (Mo. 1985) 698 S.W.2d 577, 578.) The defendant subsequently petitioned the federal district court for a writ of habeas corpus. The district court denied the writ, but the federal court of appeals reversed, holding that the double jeopardy clause does apply to noncapital sentencing proceedings. The Supreme Court granted certiorari. (*Caspari*, *supra*, 510 U.S. at pp. 387-388.)

In deciding *Caspari*, the Supreme Court applied *Teague* v. *Lane* (1989) 489 U.S. 288 (*Teague*), which held that new rules of constitutional law do not generally apply retroactively so as to permit reopening of final convictions by way of habeas corpus petitions. The *Caspari* court reasoned that, if application of the federal double jeopardy clause to noncapital sentencing proceedings would constitute a "new constitutional rule of criminal procedure" that would "break[] new ground or

impose[] a new obligation on the States" (*Teague*, *supra*, 489 U.S. at pp. 299, 301 (plur. opn. of O'Connor, J.)), then the district court correctly denied the writ of habeas corpus. (*Caspari*, *supra*, 510 U.S. at p. 390.) The court noted its historic refusal to apply the double jeopardy clause to sentencing proceedings, with the only exception being capital sentencing proceedings such as the one at issue in *Bullington*. (*Caspari*, *supra*, 510 U.S. at pp. 391-392.) The court then compared sentencing proceedings in noncapital cases to those in capital cases. Noting that sentencing in a capital case is unique and that procedural safeguards apply in capital cases that do not apply in other cases (*id.* at pp. 392-393), the court concluded "that the [federal] Court of Appeals announced a new rule in this case" by extending *Bullington* to noncapital cases (*Caspari*, *supra*, 510 U.S. at p. 395). Accordingly, the defendant's sentence was " 'consistent with established constitutional standards' " as of the time the sentence became final (*Teague*, *supra*, 489 U.S. at p. 306 (plur. opn. of O'Connor, J.), quoting *Desist* v. *United States* (1969) 394 U.S. 244, 262-263 (dis. opn. of Harlan, J.)), and the federal court of appeals erred in directing the district court to grant the writ (*Caspari*, *supra*, 510 U.S. at pp. 396-397).

Given this conclusion, the high court declined to decide whether the double jeopardy clause applies to noncapital sentencing proceedings. (*Caspari*, *supra*, 510 U.S. at p. 397.) Nevertheless, the court confirmed that none of its decisions applies the clause in that context. Indeed, the court asserted that "a reasonable jurist reviewing our precedents" would not conclude otherwise. (*Id.* at p. 393.) Thus, though we do not know how the Supreme Court would resolve the issue now before us, we do know that, like the sentence imposed in *Caspari*, the sentence here is " 'consistent with established constitutional standards.' " (*Teague*, *supra*, 489 U.S. at p. 306 (plur. opn. of O'Connor, J.).) Furthermore, *Caspari* highlights the basic flaw of the dissent's reasoning. The premise of the dissent is that *Bullington* requires application of the federal double jeopardy clause whenever a sentencing proceeding, whether capital or noncapital, has "the hallmarks of the trial on guilt or innocence."

(*Bullington, supra,* 451 U.S. at p. 439.) The Missouri persistent offender statutes at issue in *Caspari*, like section 1025, created a proceeding with all these "hallmarks," including proof beyond a reasonable doubt. (*Bohlen* v. *Caspari*, *supra*, 979 F.2d at pp. 112-113.) If the dissent's articulation of *Bullington*'s holding were correct, then the Court of Appeals' decision in *Caspari*, barring retrial of the persistent offender issue, would have constituted a straight application of established precedent. The high court would not have found that retrial was " 'consistent with established constitutional standards' " (*Teague*, *supra*, 489 U.S. at p. 306 (plur. opn. of O'Connor, J.)), and the high court would not have concluded "that the Court of Appeals announced a new rule in this case." (*Caspari, supra,* 510 U.S. at p. 395.) In light of *Caspari*, *Bullington* simply does not dictate the result in this case.

Finally, the *Caspari* court suggested that, if faced with the issue, it would find the double jeopardy clause inapplicable to the sentencing determination involved here. "Persistent-offender status is a fact objectively ascertainable on the basis of readily available evidence. Either a defendant has the requisite number of prior convictions, or he does not. Subjecting him to a second proceeding at which the State has the opportunity to show those convictions is not unfair and will enhance the accuracy of the proceeding by ensuring that the determination is made on the basis of competent evidence." (*Caspari*, *supra*, 510 U.S. at p. 396.)

In conclusion, we hold that the federal double jeopardy clause does not apply to the trial of the prior conviction allegation in this case.

Of course, in *People* v. *Superior Court* (*Marks*) (1991) 1 Cal.4th 56, 78, footnote 22, we applied double jeopardy protections to bar retrial of a sentence-enhancing allegation in a noncapital case, saying: "The jury's rejection [of the allegation] constituted an express acquittal on the enhancement and forecloses any retrial." In *Marks*, we relied primarily on the Court of Appeal decision in *People* v. *Pettaway* (1988) 206 Cal.App.3d 1312, 1331-1332, which in turn relied on *People* v. *Henderson* (1963) 60 Cal.2d 482 and *People* v. *Collins* (1978) 21 Cal.3d 208.

Henderson, which we reaffirmed in *Collins*, held that, when a defendant successfully challenges his conviction, the state double jeopardy clause prohibits imposition of a greater sentence following retrial, thus preventing an "unreasonabl[e] impair[ment]" of "[a] defendant's right of appeal from an erroneous judgment." (*People* v. *Henderson*, *supra*, 60 Cal.2d at p. 497; see also *People* v. *Collins*, *supra*, 21 Cal.3d at p. 216; *People* v. *Hood* (1969) 1 Cal.3d 444, 459; *People* v. *Ali* (1967) 66 Cal.2d 277, 281.) Our reference in *Marks* to "an express acquittal on the enhancement" might suggest a broader holding than mere application of *Henderson* and its progeny, but because *Marks* included no analysis of the complex issues we address in this case, we think a narrow reading of *Marks* is appropriate. (See *People* v. *Santamaria* (1994) 8 Cal.4th 903, 914, fn. 4 [stating the policy underlying *Henderson* as a reason for barring retrial of enhancements].)[2] Because we based our decision in *Marks* on an interpretation of the California Constitution that is not relevant here, *Marks* has no bearing upon our interpretation of the federal Constitution.

California Constitution

We must also determine whether the double jeopardy protection of the California Constitution bars retrial of the prior conviction allegation in this case. The state Constitution provides that "[p]ersons may not twice be put in jeopardy for the same offense." (Cal. Const., art. I, § 15.) By comparison, the federal Constitution provides that "[n]o person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb." (U.S. Const., 5th Amend.) The "California Constitution is a document of independent force and effect that may be interpreted in a manner more protective of defendants' rights than that extended by the federal Constitution . . . ." (*People* v. *Fields* (1996) 13 Cal.4th 289, 298.) Nevertheless, when we interpret a provision of the California Constitution that is similar to a provision of the federal Constitution, " 'cogent reasons must exist' " before we will construe the

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2 Whether *Marks* correctly applied the *Henderson* rule is not before us.

Constitutions differently and " 'depart from the construction placed by the Supreme Court of the United States.' " (*Raven* v. *Deukmejian* (1990) 52 Cal.3d 336, 353, quoting *Gabrielli* v. *Knickerbocker* (1938) 12 Cal.2d 85, 89.)

The purpose behind the state and federal double jeopardy provisions is the same. Like decisions interpreting the federal double jeopardy clause, "[d]ecisions under the double jeopardy clause of the California Constitution . . . recognize the defendant's interest in avoiding both the stress of repeated prosecutions and the enhanced risk of erroneous conviction." (*People* v. *Fields, supra,* 13 Cal.4th at p. 298.) In certain contexts, this court has decided that, in furthering this purpose, the state double jeopardy clause provides greater protection than its federal counterpart. The rule, which we already discussed, protecting defendants from receiving a greater sentence if reconvicted after a successful appeal (see *People* v. *Collins*, *supra*, 21 Cal.3d at p. 216; *People* v. *Hood*, *supra*, 1 Cal.3d at p. 459; *People* v. *Ali*, *supra*, 66 Cal.2d at p. 281; *People* v. *Henderson*, *supra*, 60 Cal.2d at pp. 495-497) is one instance where we have interpreted the state double jeopardy clause more broadly than the federal clause. (Cf. *Pearce*, *supra*, 395 U.S. at pp. 719-721 [finding no violation of the federal double jeopardy clause under similar circumstances].) A second instance is the rule prohibiting retrial after the trial court has declared a mistrial without the defendant's consent. (*Curry* v. *Superior Court* (1970) 2 Cal.3d 707, 715-718; *Cardenas* v. *Superior Court* (1961) 56 Cal.2d 273, 275-276; cf. *Gori* v. *United States* (1961) 367 U.S. 364, 365 [finding no violation of the federal double jeopardy clause under similar circumstances].)

Under the circumstances of the present case, we find no reason to construe the California Constitution to afford greater protection than the federal Constitution. As we described above, though the effect on a defendant's sentence may be significant, the embarrassment, expense, and anxiety of trying a prior conviction allegation are relatively minor, and the risk of an erroneous result is slight. The primary source of embarrassment is the defendant's present offense, not an allegation of a prior

conviction. The trial of a prior conviction allegation is relatively perfunctory, and the outcome is usually predictable. We see no reason, in the present context, to interpret the state Constitution differently from the federal. (Cf. *People* v. *Saunders*, *supra*, 5 Cal.4th at p. 596.) Accordingly, we conclude that the double jeopardy provision of the state Constitution does not apply to the trial of the prior conviction allegation in this case. (Cf. *People* v. *Morton* (1953) 41 Cal.2d 536 [permitting retrial of a prior conviction allegation under facts similar to those here, but without discussing double jeopardy].)

CONCLUSION

We conclude that the state and federal double jeopardy protections do not apply to the trial of the prior conviction allegation in this case. Of course, this conclusion raises numerous secondary issues. For example, the Court of Appeal's determination that the evidence was insufficient to prove defendant's prior conviction was of a serious felony is, at the very least, the law of this case. Thus, the prosecution would have to present additional evidence at a retrial of the prior conviction allegation in order to obtain a different result. What limitations might apply to this additional evidence (other than the limitations we identified in *People* v. *Reed*, *supra*, 13 Cal.4th 217, and *Guerrero*, *supra*, 44 Cal.3d 343), we do not decide, because the Court of Appeal did not address that issue. For the same reason, we express no opinion about whether section 1025 (or some other applicable provision) might in some cases bar retrial of the prior conviction allegation as a statutory matter irrespective of constitutional constraints. Finally, we express no opinion about whether due process protections preclude the prosecution from retrying the prior conviction allegation. (Cf. *Pearce*, *supra*, 395 U.S. at pp. 723-724; *Blackledge* v. *Perry* (1974) 417 U.S. 21, 28-29.)

Because the state and federal double jeopardy protections do not apply to the trial of the prior conviction allegation in this case, we reverse the judgment of the Court of Appeal to the extent it barred retrial of that allegation on double jeopardy grounds.

CHIN, J.

WE CONCUR:

GEORGE, C.J.
BAXTER, J.

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S055881

CONCURRING OPINION BY BROWN, J.

I concur in the result, although I would favor a more cautious approach. The double jeopardy clause has proven singularly difficult to apply and remains one of the most " 'misunderstood maxims in the law, the passage of time having served in the main to burden it with confusion upon confusion.' " (Westen & Drubel, *Toward a General Theory of Double Jeopardy* (1978) Sup.Ct. Rev. 81, 82, fn. 6.)

While acknowledging that its precedents could hardly be characterized as "models of consistency and clarity" (*Burks* v. *United States* (1978) 437 U.S. 1, 9), the United State Supreme Court has held the prosecution is not entitled to retrial when a conviction is reversed for insufficient evidence. (*Id.* at pp. 9-11.) The question in this case is whether the prosecution is similarly barred from retrying a prior-conviction-sentence enhancement allegation when the true finding is reversed for insufficient evidence.

This is a question the high court has never specifically addressed. (*Bullington* v. *Missouri* (1981) 451 U.S. 430, 445; *Caspari* v. *Bohlen* (1994) 510 U.S. 383, 397.) In *Bullington*, the court considered whether the double jeopardy clause barred the prosecution from seeking the death penalty on retrial following reversal of an earlier conviction imposing a lesser penalty. *Bullington* marked the first time the court had applied the double jeopardy clause to a sentencing determination. (*Bullington* v. *Missouri*, *supra*, at p. 438.)

Bullington's characterization of the first jury's decision to impose life imprisonment as an acquittal of " 'whatever was necessary to impose the death sentence' " (*Bullington* v. *Missouri*, *supra*, 451 U.S. at p. 445, quoting *State ex rel. Westfall* v. *Mason* (Mo.Sup.Ct. 1980) 594 S.W.2d 908, 922 (dis. opn. of Bardgett, C.J.)), is strongly reminiscent of the court's decision in *Green* v. *United States* (1957) 355 U.S. 184. In *Green*, the court held the double jeopardy clause barred retrial of a greater offense after the jury at the defendant's first trial convicted him of the lesser included offense. (*Id.* at p. 191.) In both settings, the failure of the prosecution to prove its greatest charge implicated a failure to prove the case-in-chief. Characterizing the failure of proof as an acquittal under these circumstances is fully consistent with the objectives of the double jeopardy clause in that it protects a defendant charged with a crime from being forced to "run the gantlet . . . on that charge" (*id.* at p. 190) more than once.

While the United States Supreme Court's cases have not "foreclosed the application of the Double Jeopardy Clause to noncapital sentencing" (*Caspari* v. *Bohlen*, *supra*, 510 U.S. at p. 393), none has applied the clause in that particular context, and the question remains unresolved. In the wake of *Bullington* and *Caspari* considerable confusion exists, but a few propositions seem clear. First, the double jeopardy clause does apply to some sentencing proceedings; second, where the clause applies, its sweep is absolute and there can be no balancing of the equities; and finally, application of double jeopardy does not depend on the mechanical application of a formula. It depends instead on the nature of the determination to be made and its relationship to the underlying offense.

As the court stated in *Caspari*: "Persistent-offender status is a fact objectively ascertainable on the basis of readily available evidence. Either a defendant has the requisite number of prior convictions, or he does not. Subjecting him to a second proceeding at which the State has the opportunity to show those convictions is not unfair, and will enhance the accuracy of the proceeding by

ensuring that the determination is made on the basis of competent evidence." (*Caspari* v. *Bohlen*, *supra*, 510 U.S. at pp. 396-397.)

Other jurisdictions have found the reasoning of *Bullington* inapplicable where the facts at issue in the sentencing determination have no bearing on facts relating to the present crime. (*Denton* v. *Duckworth* (7th Cir. 1989) 144, 148 [unlike death penalty determination in *Bullington*, habitual offender statute does not require consideration of facts underlying substantive offense]; *Linam* v. *Griffin* (10th Cir. 1982) 685 F.2d 369, 375 [same]; *People* v. *Sailor* (N.Y.App. 1985) 480 N.E.2d 701, 707 [*Bullington* implicitly recognizes death penalty was part of substantive offense of murder].)

When the prosecutor fails to prove a prior conviction allegation, a retrial does not require a factfinder to reevaluate the evidence underlying the substantive offense. Under these circumstances a retrial does not subject a defendant to the risk of repeated prosecution within the meaning of the double jeopardy clause.

BROWN, J.

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DISSENTING OPINION BY WERDEGAR, J.

I dissent. With due respect, I believe the majority fails to appreciate the import of the United States Supreme Court decisions touching on this difficult issue, especially the meaning of *Bullington* v. *Missouri* (1981) 451 U.S. 430 (hereafter sometimes *Bullington*). As I explain, *Bullington* and its progeny compel a conclusion that the federal double jeopardy clause precludes the People from retrying the prior felony conviction allegation in this case. Moreover, even assuming the federal double jeopardy clause does not apply here, I conclude the double jeopardy clause of the state Constitution (Cal. Const., art. I, § 15) protects Californians from multiple retrials of sentence enhancement allegations, at least as the statutory law concerning such enhancement allegations is now written.

I. Double Jeopardy Under the Federal Constitution

As the majority correctly recognizes, "the Supreme Court has never held that the double jeopardy clause applies generally to proceedings, like the one in this case, to determine whether a defendant should receive a longer sentence because of prior convictions." (Lead opn., *ante*, p. 5; conc. opn. of Brown, J., *ante*, p. 1 ["This is a question the high court has never specifically addressed."].) The persuasive force of this observation, however, is diminished by the fact the high court also has never held the reverse, i.e., it has never held the double

jeopardy clause is *in*applicable to all noncapital sentencing proceedings. Just as we have avoided resolving this issue (*People* v. *Valladoli* (1996) 13 Cal.4th 590, 608 [assuming without deciding double jeopardy protections apply to prior conviction enhancement allegations]; *People* v. *Wiley* (1995) 9 Cal.4th 580, 593, fn. 8 [need not decide the issue]), the United States Supreme Court has similarly managed to avoid a definitive decision on the issue. The most recent example of this avoidant behavior is *Caspari* v. *Bohlen* (1994) 510 U.S. 383 (hereafter *Caspari*), in which the high court explained that "[b]ecause of our resolution of this case on Teague[1] grounds, we have no occasion to decide whether the Double Jeopardy Clause applies to noncapital sentencing . . . ." (*Caspari*, *supra* at p. 397 [127 L.Ed.2d at p. 250]; see also *Lockhart* v. *Nelson* (1988) 488 U.S. 33, 37, fn. 6 [because state conceded the issue, court "assume[d], without deciding" double jeopardy applied to noncapital sentencing proceedings]; *Hunt* v. *New York* (1991) 502 U.S. 964 (opn. by White, J. dis. from den. of cert.) [arguing high court should grant certiorari to resolve split in authority concerning the "key question . . . whether the Double Jeopardy Clause applies to trial-like sentence enhancement proceedings in noncapital cases"].) As I explain, although the slate is not entirely a clean one, the majority misapprehends the importance of *Bullington*, *supra*, 451 U.S. 430, and its progeny.

I begin with first principles. The Fifth Amendment provides: "No person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb. . . ." This provision was made applicable to the states through the Fourteenth Amendment by the Supreme Court's decision in *Benton* v. *Maryland* (1969) 395 U.S. 784. The federal double jeopardy clause "protects against a second

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1 See *Teague* v. *Lane* (1989) 489 U.S. 288, governing the retroactivity of newly-announced rules to cases proceeding via habeas corpus in the federal courts.

prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." (*North Carolina* v. *Pearce* (1969) 395 U.S. 711, 717, fn. omitted.) "The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." (*Green* v. *United States* (1957) 355 U.S. 184, 187-188.)

The general rule is that the federal double jeopardy prohibition does not operate to prevent a retrial following reversal of the judgment on appeal. (*North Carolina* v. *Pearce, supra,* 395 U.S. at pp. 719-720; *United States* v. *Tateo* (1964) 377 U.S. 463, 465.) An important exception to this general rule, however, applies when the judgment is reversed for insufficient evidence. (*Burks* v. *United States* (1978) 437 U.S. 1 [hereafter *Burks*].) In such cases, retrial is barred by the federal double jeopardy clause because "the prosecution . . . has been given one fair opportunity to offer whatever proof it could assemble. Moreover, such an appellate reversal means that the government's case was so lacking that it should not have even been submitted to the jury. Since we necessarily afford absolute finality to a jury's verdict of acquittal — no matter how erroneous its decision — it is difficult to conceive how society has any greater interest in retrying a defendant when, on review, it is decided as a matter of law that the jury could not properly have returned a verdict of guilty." (*Id.*, at p. 16.) Inasmuch as *Burks* delineates the scope of federal constitutional law, we have consistently followed the rule set forth in that case. (See *People* v. *Trevino* (1985) 39 Cal.3d 667, 694-699, disapproved on another ground, *People* v. *Johnson* (1989) 47 Cal.3d 1194, 1216-1221; *People*

v. *Belton* (1979) 23 Cal.3d 516, 526-527 & fn. 13; see generally 1 Witkin & Epstein, Cal. Criminal Law (2d ed. 1988) Defenses, § 319(b), pp. 368-369 ["The *Burks* rule has been adhered to by the California courts"].)

The Court of Appeal in this case reversed the jury's finding on the alleged prior serious felony conviction, explaining the People failed to produce sufficient evidence defendant personally inflicted great bodily injury or personally used a weapon in the prior crime. This was not a reversal for mere trial error such as the erroneous admission or exclusion of evidence at trial. Instead, the appellate court's action was a reversal for insufficient evidence. If the federal double jeopardy clause applies to sentence enhancements generally, or to the particular enhancement at issue in this case (i.e., Pen. Code, §§ 667, subds. (b)-(i) [legislative "Three Strikes" law], 1170.12, subds. (a)-(d) [initiative "Three Strikes" law]), the *Burks* rule would prohibit retrial of the enhancement allegation. The lead opinion reasons the *Burks* rule does not apply, finding the federal double jeopardy clause inapplicable to sentencing hearings unless the death penalty is involved. As I explain, the lead opinion's reading of applicable Supreme Court precedent is flawed.

The lead opinion is correct that double jeopardy protections do not apply to traditional criminal sentencing proceedings. "Historically, the pronouncement of sentence has never carried the finality that attaches to an acquittal." (*United States* v. *DiFrancesco* (1980) 449 U.S. 117, 133 [hereafter *DiFrancesco*].) Most recently, the high court explained that "[t]raditionally, '[s]entencing courts have not only taken into consideration a defendant's prior convictions, but have also considered a defendant's past criminal behavior, even if no conviction resulted from that behavior.' *Nichols* v. *United States*, 511 U.S. 738, 747; 128 L.Ed.2d 745[, 754] (1994). We explained in *Williams* v. *New York*, 337 U.S. 241, 246 (1949), that 'both before and since the American colonies became a nation, courts

in this country and in England practiced a policy under which a sentencing judge could exercise wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law.' " (*Witte* v. *United States* (1995) 515 U.S. 389, 397-398 [132 L.Ed.2d 351, 362-363].) "Against this background of sentencing history, we specifically have rejected the claims that double jeopardy principles bar a later prosecution or punishment for criminal activity where that activity has been considered at sentencing for a separate crime." (*Id.*, at p. 398 [132 L.Ed.2d at p. 363].)

We, of course, have such "traditional" sentencing proceedings in California. Following the jury's verdict, the trial court must set a hearing within 20 judicial days of verdict for pronouncement of judgment. (Pen. Code, § 1191.) At this hearing, the trial judge considers the probation report (see Cal. Rules of Court, rules 411 [presentence investigations and reports], 411.5 [probation officer's presentence investigation report]) and exercises broad discretion in deciding whether probation is justified as a sentencing option (*id.*, rule 414 [criteria affecting probation]), in selecting the base term (*id.*, rule 420) and in choosing whether to impose concurrent or consecutive terms (*id.*, rule 425 [criteria affecting concurrent or consecutive sentences]). In making these determinations, the trial judge considers the circumstances in aggravation (*id.*, rule 421) and in mitigation (*id.*, rule 423), which need not be either pleaded or proved by the People. (See generally, *People* v. *Hernandez* (1988) 46 Cal.3d 194, 204-206 [noting difference between "a trial court's decision in fashioning appropriate punishment from the need to establish before the trier of fact the wrongful criminal conduct for which punishment is being imposed"]; *People* v. *Betterton* (1979) 93 Cal.App.3d 406 ["full panoply of rights" not required in sentencing hearing]; *People* v. *Thomas* (1979) 87 Cal.App.3d 1014 [Cal. Rules of Court intended to guide sentencing

courts, not give notice of prohibited acts].) In most cases, the number of potential sentencing dispositions and permutations is great, as is the discretion of the sentencing judge. Such "traditional" sentencing proceedings are not at issue in this case, and I agree double jeopardy principles do not apply to proceedings of this type.

As is apparent, "traditional" sentencing proceedings are held without a jury, permit consideration of probation reports and involve broad sentencing court discretion to choose among a variety of outcomes. Such hearings must be distinguished from the type of criminal sentencing hearing that follows the trial on the substantive criminal offenses and is addressed typically (but not exclusively) to the existence of enhancements. In this latter type of hearing, formal notice of the sentence enhancement allegation must be given, a jury determines historical facts that can lead to enhanced or longer sentences, the People bear the burden of proof beyond a reasonable doubt by admissible evidence, and the sentencer must choose one of two outcomes. This latter type of sentencing hearing constitutes a separate trial or a "trial-like" proceeding on punishment. As I explain, the lesson of *Bullington v. Missouri, supra,* 451 U.S. 430, and its progeny is that in such cases, federal double jeopardy protections apply.

A. *Bullington* and its Progeny

Bullington involved a defendant convicted in Missouri of capital murder. Under Missouri law, the defendant in *Bullington* was entitled to a separate presentence hearing on the question of penalty. State law guaranteed him the following procedural rights at that hearing: the same jury that found him guilty of murder would hear additional evidence; notice of the aggravating evidence must be given; the jury must consider 10 aggravating and 6 mitigating factors specified by law; the jury must weigh the various factors and identify in writing which factors it found proved beyond a reasonable doubt; the jury must find that the

aggravating evidence warrants imposition of the death penalty beyond a reasonable doubt; and the jury's decision must be unanimous. (*Bullington supra*, 451 U.S. at pp. 433-434.) After a presentence hearing, the jury eschewed the death penalty and imposed on the defendant a sentence of life with no parole for 50 years.

The defendant in *Bullington* then moved for judgment of acquittal or for a new trial. When the trial court granted the new trial motion, the prosecution announced its decision that, during the retrial, it would again seek the death penalty. The defendant objected, citing the federal double jeopardy clause, and the high court agreed. The Supreme Court first noted that it "has resisted attempts to extend [double jeopardy principles] to sentencing. The imposition of a particular sentence usually is not regarded as an 'acquittal' of any more severe sentence that could have been imposed. The Court generally has concluded, therefore, that the Double Jeopardy Clause imposes no absolute prohibition against the imposition of a harsher sentence at retrial after a defendant has succeeded in having his original conviction set aside." (*Bullington*, *supra*, 451 U.S. at p. 438.) For this proposition, the high court cited the cases on which the lead opinion relies, i.e., *North Carolina* v. *Pearce*, *supra*, 395 U.S. 711, *DiFrancesco*, *supra*, 449 U.S. 117, *Chaffin* v. *Stynchcombe* (1973) 412 U.S. 17, *Stroud* v. *United States* (1919) 251 U.S. 15 (hereafter *Stroud*).

The *Bullington* court declined, however, to follow this line of reasoning. Because its explanation for diverging from the previous rule is critical to this case, I quote it extensively:

"The procedure that resulted in the imposition of the sentence of life imprisonment upon petitioner Bullington at his first trial, however, differs significantly from those employed in any of the Court's cases where the Double Jeopardy Clause has been held inapplicable to sentencing. The jury in this case was *not given unbounded discretion* to select an appropriate punishment from a

wide range authorized by statute. Rather, *a separate hearing was required* and was held, and the jury was presented both a *choice between two alternatives and standards to guide the making of that choice*. Nor did the prosecution simply recommend what it felt to be an appropriate punishment. It undertook the *burden of establishing certain facts beyond a reasonable doubt* in its quest to obtain the harsher of the two alternative verdicts. *The presentence hearing resembled and, indeed, in all relevant respects was like the immediately preceding trial on the issue of guilt or innocence. It was itself a trial on the issue of punishment so precisely defined by the Missouri statutes.*

"In contrast, the sentencing procedures considered in the Court's previous cases *did not have the hallmarks of the trial on guilt or innocence*. In Pearce, Chaffin and Stroud, there was no separate sentencing proceeding at which the prosecution was required to prove — beyond a reasonable doubt or otherwise — additional facts in order to justify the particular sentence. In each of those cases, moreover, the sentencer's discretion was essentially unfettered. In Stroud, no standards had been enacted to guide the jury's discretion. In Pearce, the judge had a wide range of punishments from which to choose with no explicit standards imposed to guide him. And in Chaffin, the discretion given to the jury was extremely broad. That defendant, convicted in Georgia of robbery, could have been sentenced to death, to life imprisonment, or to a prison term of between 4 and 20 years. [Citation.] The statute contained no standards to guide the jury's exercise of its discretion." (*Bullington*, *supra*, 451 U.S. at pp. 438-440, italics added, fns. omitted.)

"In the usual sentencing proceeding, however, it is impossible to conclude that a sentence less than the statutory maximum 'constitute[s] a decision to the effect that the government has failed to prove its case.' In the normal process of sentencing, 'there are virtually no rules or tests or standards — and thus no issues

to resolve. . . .' M. Frankel, Criminal Sentences: Law Without Order 38 (1973). Thus, '[t]he discretion of the judge . . . in [sentencing] matters is virtually free of substantive control or guidance. Where the judge has power to select a term of imprisonment within a range the exercise of that authority is left fairly at large.' Kadish, Legal Norm and Discretion in the Police and Sentencing Processes, 75 Harv.L.Rev. 904, 916 (1962)." (*Bullington*, *supra*, 451 U.S. at pp. 443-444, fn. omitted.)

"By enacting a capital sentencing procedure *that resembles a trial on the issue of guilt or innocence*, however, Missouri explicitly requires the jury to determine whether the prosecution has 'proved its case.' . . . [W]e therefore refrain from extending the rationale of Pearce to the very different facts of the present case. Chief Justice Bardgett, in his dissent from the ruling of the Missouri Supreme Court majority, observed that the sentence of life imprisonment which petitioner received at his first trial meant that 'the jury has already acquitted the defendant of whatever was necessary to impose the death sentence.' 594 S.W.2d, at 922. We agree." (*Bullington*, *supra*, 451 U.S. at pp. 444-445, italics added.) "Having received 'one fair opportunity to offer whatever proof it could assemble,' [citation], the State is not entitled to another." (*Id.*, at p. 446, quoting *Burks*, *supra*, 437 U.S. at p. 16.)

As is clear, the high court found *Bullington* distinguishable from prior cases because of the nature of the sentencing proceeding involved. Unlike past cases, the separate sentencing proceeding in *Bullington* bore "the hallmarks of the trial on guilt or innocence" (451 U.S. at p. 439), including the right to a jury, notice to the defendant of the facts to be proved, the submission of evidence and presentation of argument, a sentencing choice between two alternatives, circumscribed discretion with standards to guide such discretion, and a requirement of jury unanimity and of proof beyond a reasonable doubt.

The Supreme Court followed *Bullington* three years later in *Arizona* v. *Rumsey* (1984) 467 U.S. 203 (hereafter *Rumsey*). In *Rumsey*, the defendant was convicted of armed robbery and first degree murder. The trial judge, without a jury, found no aggravating circumstances present and thus determined the appropriate sentence under state law was life imprisonment without the possibility of parole for 25 years. On appeal, the Arizona Supreme Court found the trial judge had been mistaken in concluding no aggravating circumstance existed and remanded for a new sentencing hearing. Following the new hearing, the trial judge sentenced the defendant to the death penalty. On appeal once again, the defendant in *Rumsey* claimed imposition of the death sentence on retrial violated the federal double jeopardy clause as interpreted in *Bullington*, *supra*, 451 U.S. 430. The state supreme court agreed and reduced the sentence to life imprisonment.

The United States Supreme Court granted Arizona's petition for a writ of certiorari and affirmed. The high court explained that "[t]he capital sentencing proceeding in Arizona shares the characteristics of the Missouri proceeding *that make it resemble a trial* for purposes of the Double Jeopardy Clause. The sentencer — the trial judge in Arizona — is required to choose between two options: death, and life imprisonment without possibility of parole for 25 years. The sentencer must make the decision *guided by detailed statutory standards* defining aggravating and mitigating circumstances; in particular, death may not be imposed unless at least one aggravating circumstance and no mitigating circumstance is found, whereas death must be imposed if there is one aggravating circumstance and no mitigating circumstance sufficiently substantial to call for leniency. The sentencer must make findings with respect to each of the statutory aggravating and mitigating circumstances, and the sentencing hearing involves *the submission of evidence and the presentation of argument*. The *usual rules of evidence govern the admission of evidence* of aggravating circumstances, and *the*

State must prove the existence of aggravating circumstances beyond a reasonable doubt. [Citations.] As the Supreme Court of Arizona held, these characteristics make the Arizona capital sentencing proceeding indistinguishable from the capital sentencing proceeding in Missouri. [Citation.]" (*Rumsey*, *supra*, 467 U.S. at pp. 209-210, italics added.)

The court in *Rumsey* thus underscored *Bullington*'s core holding that the federal double jeopardy clause will apply to sentencing proceedings when such proceedings bear "the hallmarks of the trial on guilt or innocence" (*Bullington*, *supra*, 451 U.S. at p. 439). Stated differently, we must ask whether the sentencing proceeding involves characteristics "that make it resemble a trial for purposes of the Double Jeopardy Clause." (*Rumsey*, *supra*, 467 U.S. at pp. 209-210.) Despite the high court's analysis in both *Bullington* and *Rumsey*, the majority declines to follow the teaching of those cases. As I explain, the majority's approach is analytically insupportable.

B. Attempts at Distinguishing *Bullington* are Unpersuasive

The lead opinion acknowledges the existence of *Bullington*, *supra*, 451 U.S. 430, and its progeny, as well as that case's "hallmarks of the trial on guilt or innocence" analysis. (See lead opn., *ante*, p. 10.) The opinion declines to apply that analysis because it finds this case is distinguishable from *Bullington* and, accordingly, "*Bullington*'s . . . analysis does not apply here." (Lead opn., *ante*, p. 10.) First, the lead opinion contends the Supreme Court has suggested it would not apply *Bullington* to noncapital sentencing hearings. (Lead opn., *ante*, p. 10.) Second, aside from any perceived direction from the Supreme Court, the lead opinion finds it significant that "many of the procedural protections that apply in a [Penal Code] section 1025 trial rest on statutory, not federal constitutional, grounds." (Lead opn., *ante*, p. 11.) Additionally, the lead opinion finds the procedures applicable to capital cases "find no parallel" in noncapital cases (*ibid.*);

the degree of mental anguish faced by a criminal defendant subject to multiple prosecutions of enhancement provisions is insufficient to warrant double jeopardy protection (*id.*, p. 12); and capital sentencing proceedings are distinguishable because they rely on proof of facts linked to the facts of the substantive crimes (*id.*, pp. 13-14; see also conc. opn. of Brown, J., *ante*, p. 3).

As I explain, any suggestions from the high court in post-*Bullington* cases are, at most, ambiguous. Nothing in *Bullington* itself suggests its analysis is limited to capital cases; more importantly, no Supreme Court case has ever *held* *Bullington* and its progeny are so limited. In addition, the distinction drawn by the lead opinion between statutory and constitutional protections is wholly unsupported; indeed, *Bullington* itself involved statutory procedural protections not mandated by the federal Constitution. Finally, the lead opinion's attempt to distinguish *Bullington* and this case on their respective facts is wholly unpersuasive.

1. The Supreme Court has Never Held* Bullington *is Limited to Capital Cases

The lead opinion asserts "the high court in subsequent cases *has suggested* that *Bullington* does not apply to noncapital cases." (Lead opn., *ante*, p. 10, italics added; but see conc. opn. of Brown, J., *ante*, p. 2 [noting "this question remains unresolved"].) Any such "suggestion," of course, would not bind this court, which has an independent constitutional obligation to adjudicate the constitutional rights of litigants before it. Moreover, the two cases the lead opinion cites as making this "suggestion," *Caspari*, *supra*, 510 U.S. 383, and *Pennsylvania* v. *Goldhammer* (1985) 474 U.S. 28 (per curiam) (hereafter *Goldhammer*), are readily distinguishable.

In *Caspari*, *supra*, 510 U.S. 383, the high court confronted an Eighth Circuit Court of Appeals decision applying the *Bullington* analysis, in the context

of a Missouri state prisoner's habeas corpus petition, to conclude prior felony convictions under Missouri's persistent offender statutes were subject to federal double jeopardy protections; thus, a state appellate court's reversal of the finding the petitioner was a persistent offender, due to insufficient evidence of the charged priors, barred retrial of the enhancement. (*Bohlen* v. *Caspari* (8th Cir. 1992) 979 F.2d 109.) The high court did not directly address the merits of this holding; instead, the court discussed whether the Eighth Circuit's decision applying double jeopardy protection to sentencing in a noncapital case was a new rule of law requiring prospective application only. (*Teague* v. *Lane*, *supra*, 489 U.S. 288.) It was in this context the Supreme Court noted that "Both *Bullington* and *Rumsey* were capital cases, and our reasoning in those cases was based largely on the unique circumstances of a capital sentencing proceeding." (*Caspari*, *supra*, at p. 392 [127 L.Ed.2d at p. 247].)

The *Caspari* court did not "hold" *Bullington* was limited to capital cases. Rather, it made the observation noted above merely to support its conclusion that "a reasonable jurist reviewing our precedents at the time respondent's conviction and sentence became final would not have considered the application of the Double Jeopardy Clause to a noncapital sentencing proceeding to be dictated by our precedents." (*Caspari*, *supra*, 510 U.S. at p. 393 [127 L.Ed.2d at p. 248].) Noting that federal and state courts had "reached conflicting holdings on the issue" (*id.*, at p. 395 [127 L.Ed.2d at p. 249]), the court concluded "that conflict concerned a 'developmen[t] in the law over which reasonable jurists [could] disagree' " (*ibid.*); accordingly, under *Teague* v. *Lane*, the Eighth Circuit erred in applying its ruling retroactively to defendant's benefit. Significantly for our purposes, the Supreme Court concluded its opinion in *Caspari* by stating: "*we have no occasion to decide whether the Double Jeopardy Clause applies to noncapital sentencing, or whether Missouri's persistent offender scheme is*

sufficiently trial-like to invoke double jeopardy protections." (*Caspari*, *supra*, at p. 397 [127 L.Ed.2d at p. 250], italics added.) As is clear, therefore, *Caspari* did not "hold" *Bullington* was limited to capital cases; more to the point, neither did the high court "suggest" it would so hold in the future. The court held only that it had not previously found *Bullington* applicable to noncapital cases, and so the Eighth Circuit's decision to do so for the first time in the context of a final conviction challenged by way of a petition for federal habeas corpus was improper.

Goldhammer, *supra*, 474 U.S. 28, presents similarly unimpressive evidence of a "suggestion" the high court would limit *Bullington* to capital cases. In that case, a per curiam opinion decided on summary disposition, the issue was whether, following a successful appeal by a defendant as to 34 of 112 counts of theft and forgery, the state was entitled to a remand for resentencing on other counts for which sentencing had been suspended. In other words, the case did not concern sentence enhancement proceedings, capital or otherwise. In a passage quoting *DiFrancesco*, *supra*, 449 U.S. at page 134, *Goldhammer* noted: "the decisions of this Court 'clearly establish that a sentenc[ing *in a noncapital case*] does not have the qualities of constitutional finality that attend an acquittal." (*Goldhammer*, *supra*, 474 U.S. at p. 30, italics added, brackets in original.)

It would be a mistake to draw any significant inferences from the bracketed phrase. *DiFrancesco* was decided one year before *Bullington* and, at that time, the general rule was indeed that the high court's "decisions in the sentencing area clearly establish that a sentence does not have the qualities of constitutional finality that attend an acquittal." (*DiFrancesco*, *supra*, at p. 134.) The Supreme Court in *Goldhammer* no doubt simply added the bracketed phrase to adjust the quotation to take into account the holding of *Bullington*. At the time *Goldhammer* was decided (1985), as now, the only two cases in which the high court has found

a sentencing proceeding subject to the double jeopardy clause have been capital cases. (*Bullington*, *supra*, 451 U.S. 430; *Rumsey*, *supra*, 467 U.S. 203.) As we have explained, however, those cases did not *turn* on the fact the death penalty was involved.

Caspari, *supra*, 510 U.S. 383, and *Goldhammer*, *supra*, 474 U.S. 28, thus provide weak evidence at best for discerning whether the Supreme Court would apply *Bullington's* analysis to a noncapital case. Moreover, if we are attempting to predict what the high court *would hold* (as opposed to what it *has held*), we must also consider *Lockhart* v. *Nelson*, *supra*, 488 U.S. 33, a case involving a hearing to determine noncapital sentence enhancements based on prior felony convictions. The *Lockhart* court "assume[d], without deciding," the double jeopardy clause applied to such proceedings. (*Id.*, at p. 37, fn. 6.) If the Supreme Court was of the opinion that *Bullington* was limited to capital proceedings, here was an opportunity to say so. If the court felt the double jeopardy clause was wholly inapplicable to sentencing proceedings not involving the death penalty, no reason appears to have decided *Lockhart* at all.

In any event, even assuming for argument *Caspari* and *Goldhammer* contain a "suggest[ion]" (lead opn., *ante*, p. 10) that the Supreme Court would not now apply the federal double jeopardy clause to noncapital sentencing proceedings, the simple fact is the high court has never actually "held" *Bullington* and *Rumsey* are so limited. Until directed otherwise by a definitive ruling, we are not bound by perceived "suggestions" in Supreme Court case law. We must decide the case before us based on constitutional principles, not predictions of what another court — even a higher court — may do if faced with a justiciable controversy. The Supreme Court having never held *Bullington* and *Rumsey* to be limited to capital cases, I would follow what several courts from around the country have done (see, e.g., *Bohlen* v. *Caspari*, *supra*, 979 F.2d 109, 113, revd.

on other grounds in *Caspari*, *supra*, 510 U.S. 383; *Durosko* v. *Lewis* (9th Cir. 1989) 882 F.2d 357, 359; *People* v. *Quintana* (Colo. 1981) 634 P.2d 413, 419; *Cooper* v. *State* (Tex.Crim.App. 1982) 631 S.W.2d 508, 513-514 (hereafter *Cooper*); *State* v. *Hennings* (Wn.2d 1983) 670 P.2d 256, 259-262 (hereafter *Hennings*) and apply *Bullington*'s "hallmarks of the trial on guilt or innocence" test to this noncapital case to determine whether the federal double jeopardy clause applies here.

2. It is Irrelevant that Defendant's Procedural Protections are Statutory Rather Than Constitutional

The lead opinion next asserts it is "relevant" that "many of the procedural protections that apply in a section 1025 trial rest on statutory, not federal constitutional, grounds." (Lead opn., *ante*, p. 11.) It is true that many of a criminal defendant's procedural rights in a trial of sentence enhancement allegations find their origins in either a statute or a decision of this court, and not in the federal Constitution. For example, a trial court has discretion to order a separate hearing to determine the truth of the prior convictions (*People* v. *Calderon* (1994) 9 Cal.4th 69), and, whether or not the trial is bifurcated, the defendant is entitled to a jury (Pen. Code, § 1025). The sentence enhancements must be pleaded and proved (see, e.g., Pen. Code, §§ 667, subd. (c), 1170.12, subd. (a), 667.5, subd. (d)), and the defendant must answer the charge in open court (Pen. Code, § 1025; see also Pen. Code, § 969½ [when prior conviction allegation is added to complaint after defendant has pleaded guilty, he must be arraigned on the allegations]). The People bear the burden of proving the sentence enhancement beyond a reasonable doubt. (*People* v. *Tenner* (1993) 6 Cal.4th 559, 566; see also, Pen. Code, § 1096 [applying standard of beyond a reasonable-doubt to "criminal actions"].)

Despite the nonconstitutional origins of these procedural protections, however, it is the lesson of *Bullington*, *supra*, 451 U.S. 430, that when a state erects a system in which sentence-enhancing facts are adjudicated in a hearing bearing "the hallmarks of the trial on guilt or innocence" (*id.*, at p. 439), the federal double jeopardy clause applies. Nothing in *Bullington* or its progeny suggests this analysis is dependent on whether the applicable procedural protections are constitutionally mandated. *Indeed, in Bullington itself, the state of Missouri required procedural protections for its capital defendants that were not grounded in the federal Constitution.* For example, Missouri law provided the jury must both designate in writing which aggravating factors it found true (Mo.Rev.Stat. § 565.012.4 (1978)) and apply a beyond a reasonable doubt standard to proof of those factors (*ibid.*; see *Bullington*, *supra*, 451 U.S. at p. 434). Neither procedural requirement is constitutionally mandated. (See *People* v. *Rodriguez* (1986) 42 Cal.3d 730, 777-778.) The lead opinion fails to account for this aspect of *Bullington*.

Accordingly, the lead opinion is simply wrong in claiming the constitutional nature of the protections involved is "relevant" (lead opn., *ante*, p. 11) to determining whether *Bullington*'s analysis should apply here. Whether or not the procedural protections offered by a state for the adjudication of sentence-enhancing facts are constitutionally mandated is simply not a relevant consideration to the question before us.

3. **Bullington *is Not Distinguishable from the Present Case***

The lead opinion next asserts that, any perceived "suggestion" in post-*Bullington* decisions aside, *Bullington* is substantively different from the present case, because it involved the death penalty, and "the trial-like procedures that regulate imposition of the death penalty find no parallel in noncapital cases." (Lead opn., *ante*, p. 11.) The lead opinion also finds *Bullington* distinguishable

due to "the unique nature . . . of capital sentencing proceedings as compared to prior conviction proceedings." (Lead opn., *ante*, p. 15.) The lead opinion fails, however, to identify any persuasive reasons, in law or logic, why *Bullington* can or should be limited to capital cases.

Death is indeed different, for the state's execution of a human being as a penal sanction is both final and irreversible, modern society's most serious criminal penalty. (*Lockett* v. *Ohio* (1978) 438 U.S. 586, 604 (opn. of Burger, C.J.) [the "qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed"]; *Gardner* v. *Florida* (1977) 430 U.S. 349, 357 (plur. opn. by Stevens, J.) [because of finality and severity of the death penalty, "it is of vital importance to the defendant and the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion"].) For purposes of double jeopardy and applying *Bullington*, however, simply labeling the death penalty as "unique" or "different" obscures the pertinent inquiry, namely, in what relevant way is the death penalty different for purposes of double jeopardy?[2]

Significantly, the *Bullington* court itself did not rely on the mere fact the death penalty was involved. Indeed, it declined to overrule *Stroud, supra,* 251 U.S. 15, a capital case in which a defendant, initially sentenced to life imprisonment, was sentenced to suffer the death penalty on retrial following a reversal and a new trial. The *Stroud* court found no double jeopardy prohibition against imposing the death penalty on retrial. Had *Bullington* held capital cases

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[2] As Justice Oliver Wendell Holmes observed, frequent repetition of an idea does not necessarily add to its logical force. "It is one of the misfortunes of the law that ideas become encysted in phrases and thereafter for a long time cease to provoke further analysis." (*Hyde* v. *United States* (1912) 225 U.S. 347, 391 (dis. opn. of Holmes, J.).)

per se were different, it should have overruled *Stroud*. Instead, *Bullington* distinguished *Stroud* as a case in which the penalty trial — unlike the one in *Bullington* — was not one "like the trial on the question of guilt or innocence." (*Bullington*, *supra*, 451 U.S. at p. 446.) "In Stroud, no standards had been enacted to guide the jury's discretion." (*Bullington*, *supra*, 451 U.S. at p. 439.) As the Supreme Court of Washington recognized: "Although Bullington involved the death penalty sentencing provision, neither the reasoning nor the holding in that case depends upon the presence of the death penalty." (*Hennings*, *supra*, 670 P.2d 256, 260.) Clearly the mere presence of the death penalty is not the key here.

Nor can we say the trial-like procedures that governed Missouri's capital sentencing proceedings are different in any meaningful way from the procedures governing the bifurcated sentencing proceeding used to determine the truth of the prior felony conviction allegation here. In both types of proceedings, the defendant may obtain a separate hearing, must be notified of what the People plan to prove, and is entitled to a jury and to counsel. In both types of proceedings, the trier of fact is guided by established standards and must choose one of two alternative verdicts. In the Missouri proceeding, the choices are death or life imprisonment without parole for 50 years. In the hearing in this case, the jury must decide whether the alleged prior conviction is true or untrue. Like the Missouri capital presentence hearing, the People in the present case are required to prove the alleged sentence enhancement beyond a reasonable doubt. As *Bullington* stated, "[t]he presentence hearing resembled and, indeed, in all relevant respects was like the immediately preceding trial on the issue of guilt or innocence. It was itself a trial on the issue of punishment . . . ." (*Bullington*, *supra*, 451 U.S. at p. 438.) Stated differently, the hearing on the prior felony conviction allegations bore "the hallmarks of the trial on guilt or innocence." (*Id.*, at p. 439.)

Accordingly, the trial-like procedures that govern Missouri's capital sentencing hearing are nearly identical to those that apply to the bifurcated proceeding held in this case to determine defendant's prior felony convictions. I thus cannot agree with the lead opinion's contrary conclusion that Missouri's capital procedures "find no parallel in noncapital cases." (Lead opn., *ante*, p. 11.)

The lead opinion also reasons that whereas *Bullington* held the relative level of embarrassment and anxiety a capital defendant would feel in facing a penalty phase trial was sufficiently comparable to the mental anguish suffered by a criminal defendant in the substantive guilt phase of a criminal trial (*Bullington*, *supra*, 451 U.S. at p. 445), the same cannot be said for a defendant facing a noncapital sentencing hearing. (Lead opn., *ante*, p. 12.) From this assessment of the emotional content of the trial experience, the lead opinion concludes *Bullington* should not be extended to noncapital sentencing proceedings.

What is missing from this discussion is a persuasive rationale supporting the bald assertion that a criminal defendant's "anxiety and insecurity" when facing a possible life sentence as a result of past crimes is not equivalent to that experienced by a defendant being tried for a substantive criminal offense. In this era of "Three-Strikes-and-You're-Out," the mental torment faced by defendants in a bifurcated sentencing hearing to determine the truth of prior conviction allegations seems at least comparable to that faced by defendants at the guilt phase of trial. Such prior convictions, if two or more are sustained, can lead to a *minimum* term in prison of twenty-five-years-to-life, with a maximum term consisting of the balance of the defendant's natural life. (Pen. Code, §§ 667, subd. (e)(2)(A)(i)-(iii), 1170.12, subd. (c)(2)(A)(i)-(iii).) Even if, as in this case, only one qualifying prior felony conviction is alleged, sustaining the prior conviction allegation will require the sentence be doubled in length, essentially adding as much time in prison as defendant received for committing the substantive offense.

(Pen. Code, §§ 667, subd. (e)(1), 1170.12, subd. (c)(1).) The lead opinion's comparison of the mental anguish suffered by capital versus noncapital defendants is thus unconvincing.

Finally, the majority finds capital penalty trials are different in kind because the evidence presented in such hearings "usually overlaps or supplements the evidence offered at the guilt phase of the trial," whereas "in a trial of a prior conviction allegation, the factual determinations are generally divorced from the facts of the present offense, and the evidence does not overlap at all." (Lead opn., *ante*, p. 14; see also conc. opn. of Brown, J., *ante*, p. 3.) Even if true, this proposed distinction finds no support in *Bullington* whatsoever. I note the majority fails to cite *Bullington* or, indeed, any authority, indicating this evidentiary factor has any relevance to a double jeopardy analysis.

Nor am I convinced the majority is correct as an empirical matter. Although "[t]he circumstances of the crime of which the defendant was convicted in the present proceeding" is an aggravating circumstance in this state's death penalty scheme (see Pen. Code, § 190.3, factor (a)), and a defendant is entitled to argue lingering doubt as a mitigating circumstance (*People* v. *Sanchez* (1995) 12 Cal.4th 1, 77), penalty phase evidence is often untethered to the facts of the crime. Instead, such evidence frequently recounts the defendant's past violent criminal conduct and/or explains aspects of the defendant's upbringing or mental health history, evidence, in other words, that does not overlap with the evidence presented at the guilt phase of the trial.

Moreover, even in a bifurcated hearing on prior felony conviction allegations, the evidence must sometimes establish some aspect of the present crime over and above the minimum necessary to obtain a guilty verdict on the substantive offense. For example, to impose a five-year enhancement term for a prior felony conviction pursuant to Penal Code section 667, subdivision (a), the

People must not only prove the existence of a qualifying prior conviction, but must also prove *the present conviction* qualifies as a "serious felony" under section 1192.7, subdivision (c). (See *People* v. *Equarte* (1986) 42 Cal.3d 456 [for assault with a deadly weapon to qualify as "serious felony" eligible for enhancement, state must prove personal weapon use or personal infliction of bodily injury]; *People* v. *Thomas* (1986) 41 Cal.3d 837 [observing that for burglary to qualify as a "serious felony" eligible for enhancement, state must prove defendant personally used a gun or deadly weapon, or inflicted great bodily injury, or entered a residence].) In such a case, we cannot say "the factual determinations [at the separate hearing] are generally divorced from the facts of the present offense . . . ." (Lead opn., *ante*, p. 14; see also conc. opn. of Brown, J., *ante*, p. 3.)

In sum, the majority proffers no persuasive reason to support its assertion that *Bullington's* "hallmarks of the trial on guilt or innocence" test is limited to capital cases.

4. The Lead Opinion's Other Arguments are Unpersuasive

The lead opinion announces other reasons for declining to apply the federal double jeopardy clause in this case, but none is persuasive. For example, the lead opinion asserts that "a criminal defendant is not entitled as a federal constitutional matter to a trial, formal or informal, of sentencing issues, even when the sentence turns on factual determinations such as the existence of prior convictions." (Lead opn., *ante*, p. 5.) Because California thus could choose to provide *very few* procedural protections for sentencing allegations, reasons the lead opinion, it could certainly choose to provide less than full protection. From this, the lead opinion concludes "a trial of sentencing allegations *arguably* need not provide double jeopardy protection." (*Id.*, at p. 6, italics added.)

This argument is beside the point. While it may be true our Legislature could choose to provide fewer procedural protections for sentence enhancements

(see *People* v. *Vera* (1997) 15 Cal.4th 269, 286 (dis. opn. of Werdegar, J.)), it has not done so. If anything, legislative action has moved in the opposite direction, ensuring a high degree of procedural protection for defendants charged with sentence-enhancing allegations. (See, e.g., Pen. Code, §§ 667, subd. (c) [prior convictions under legislative Three Strikes law must be "pled and proved"], 1170.12, subd. (a) [same under initiative Three Strikes law], 667.5, subd. (d) [prior prison term enhancements "shall not be imposed unless they are charged and admitted or found true"], 1025 [right to jury for prior felony conviction enhancements], 1102 [rules of evidence apply to criminal "actions"]; see also Pen. Code, § 190.3 [in penalty phase of capital case, evidence of prior criminal activity shall not be admitted "for an offense for which the defendant was prosecuted and acquitted"].)

The lead opinion also suggests federal double jeopardy cannot apply here because the Fifth Amendment specifically refers to "the offense," and "[t]he [double jeopardy] clause makes no express reference to sentencing determinations." (Lead opn., *ante*, p. 7.) This argument is belied by *Bullington* itself, for the high court applied the federal double jeopardy clause to the Missouri capital sentencing trial although no "offense" was involved therein. Clearly any suggestion the federal double jeopardy clause is limited to criminal "offenses" is incorrect.

5. Authority from the Federal Circuits and Other States

Citing several cases from the various federal circuits and other states, the majority admits these courts "are divided as to whether the federal double jeopardy clause applies to proceedings analogous to the one here." (Lead opn., *ante*, p. 14; see also conc. opn. of Brown, J., *ante*, p. 3.) As the lead opinion concedes, several federal circuits and state courts have profitably applied the *Bullington* "hallmarks of the trial on guilt or innocence" test to find the federal double jeopardy clause

applicable to noncapital sentencing proceedings. For example, in *Briggs* v. *Procunier* (5th Cir. 1985) 764 F.2d 368 (hereafter *Briggs*), Texas indicted the defendant for burglary and alleged two prior felony convictions which, if proved, required he be sentenced to life in prison. After a jury found the defendant guilty of the charged burglary, the state dismissed the charged prior convictions, citing proof problems. The defendant sought a new trial and the state joined the motion. When it was granted, the state again indicted the defendant for burglary. This time, however, the state charged two different prior felony convictions to enhance the sentence. (*Id.*, at p. 369.) The prior felonies were found true and the defendant was sentenced to life imprisonment.

The Fifth Circuit Court of Appeals applied the *Bullington* "hallmarks of the trial on guilt or innocence" test to reverse the district court's denial of relief on habeas corpus. "Like the death-sentencing procedure discussion in Bullington v. Missouri, 451 U.S. 430 (1981), the Texas scheme requires the state to prove at trial, beyond a reasonable doubt, the predicate facts, two prior convictions, necessary for the imposition of the harsher sentence. 'The two prior convictions must be alleged in the indictment, and upon review the allegations are treated the same as allegations of the elements of a substantive offense.' [Citation.] Therefore, if the state fails to introduce sufficient evidence of the defendant's status as an habitual offender at a first trial, the Double Jeopardy Clause prohibits the sentencing of the defendant as an habitual offender at a second trial." (*Briggs, supra,* 764 F.2d at p. 371.)

The Supreme Court of Washington reached the same conclusion in *Hennings*, *supra*, 670 P.2d 256. The defendant in *Hennings* was charged with robbery and with being an habitual criminal under Washington's habitual offender law. He ultimately pleaded guilty to robbery, but the trial court dismissed the habitual criminal charge, concluding the People failed to prove defendant's guilty

plea in the prior conviction matter was knowingly and voluntarily obtained, a statutory requirement under Washington law. (*Id.*, p. 257.)

The Washington high court held double jeopardy precluded the People from recharging and retrying the habitual criminal allegation. The court explained that, like the capital proceeding at issue in *Bullington*, *supra*, 451 U.S. 430, an habitual offender determination under Washington law takes place in a separate proceeding in which the state bears the burden of proof beyond a reasonable doubt. In addition, should the allegation be proved, the range of penalties is strictly circumscribed: if the sentence is not suspended, the habitual offender must be sentenced to life imprisonment; there is no other sentence. (*Hennings*, *supra*, 670 P.2d at p. 258.) The "similarities [between *Bullington* and the Washington habitual offender law] indicate that under Bullington double jeopardy principles should apply to Washington's habitual criminal proceedings." (*Hennings*, *supra*, 670 P.2d at p. 260.)

As illustrated by *Briggs*, *supra*, 764 F.2d 368, and *Hennings*, *supra*, 670 P.2d 256, the majority rule that has emerged from the federal circuit courts and state high courts is this: *Bullington*'s "hallmarks of the trial on guilt or innocence" test is the applicable standard to determine whether noncapital sentencing proceedings are subject to the federal double jeopardy clause. As in *Briggs* and *Hennings*, many courts have found double jeopardy applies to bar retrial of a noncapital sentencing allegation because the state law at issue bore the hallmarks of a trial on guilt. (In addition to *Briggs*, *supra*, 764 F.2d 368 [5th Circuit], and *Hennings*, *supra*, 670 P.2d 256 [Washington], see, e.g., *Bohlen* v. *Caspari*, *supra*, 979 F.2d at p. 113, revd. on other grounds in *Caspari*, *supra*, 510 U.S. 383 [8th Circuit, interpreting Missouri habitual offender law]; *Nelson* v. *Lockhart* (8th Cir. 1987) 828 F.2d 446, 447-448, revd. on other grounds, *Lockhart* v. *Nelson*, *supra*, 488 U.S. 33 [interpreting Arkansas habitual offender law]; *Durosko* v. *Lewis*,

supra, 882 F.2d at p. 359 [9th Circuit interpreting Arizona law]; *People* v. *Quintana*, *supra*, 634 P.2d at p. 419 [Colorado]; *Cooper*, *supra*, 631 S.W.2d at pp. 513-514 [Texas]; *Ex Parte Augusta* (Tex.Crim.App. 1982) 639 S.W.2d 481, 484 [following *Cooper*]; cf. *DeBussi* v. *State* (Miss. 1984) 453 So.2d 1030, 1032-1033 [applying a *Bullington*-type analysis to conclude double jeopardy under the Mississippi Constitution barred retrial of habitual offender allegation].)

Other courts have applied *Bullington*'s "hallmarks of the trial on guilt or innocence" test to noncapital sentencing proceedings to come to a contrary conclusion, i.e., that the sentencing law at issue did not bear sufficient similarity to a trial on the question of guilt. Accordingly, these courts have found double jeopardy did not prohibit a retrial under the particular statutory scheme at issue. For example, in *Wilmer* v. *Johnson* (3d Cir. 1994) 30 F.3d 451 (hereafter *Wilmer*), a challenge to a Pennsylvania drug trafficker sentence enhancement scheme, the appellate court applied the *Bullington* "hallmarks of the trial on guilt or innocence" test to find double jeopardy did not apply. Noting the state was permitted to appeal the sentence in the particular statutory sentencing scheme at issue, the *Wilmer* court concluded there would be no second "trial." More importantly, only a preponderance of the evidence test was applicable. "The lower standard of proof signifies a more lax procedure which in turn signifies that a hearing is not, in the Bullington calculus, trial-like." (*Wilmer*, *supra*, 30 F.3d at pp. 457-458.) Contrary to the suggestion of the majority that *Wilmer* held double jeopardy could not apply to noncapital sentencing because of the absence of the death penalty, the *Wilmer* court applied *Bullington's* "hallmarks of the trial on guilt or innocence" test and concluded the state sentencing scheme at issue there was insufficiently analogous to a trial on guilt.

People v. *Levin* (Ill. 1993) 623 N.E.2d 317, which dealt with the Illinois habitual offender statute, also applied the *Bullington* analysis to a noncapital case

before finding double jeopardy did not apply. "The legislature has fashioned the habitual-criminal sentencing proceeding to be less formalized than a trial. Indeed, the paucity of due process protections at sentencing supports the conclusion that the legislature has deemed the defendant's interests at this stage of the proceeding to warrant fewer of those protections than at trial. We conclude that the separate hearing procedure under our Act bears insufficient formalities of a trial to render that factor analogous to the separate hearing procedure in Bullington and to this defendant's trial on the issue of guilt." (623 N.E.2d at p. 325.) In other words, the separate hearing held pursuant to Illinois's habitual offender statute does not bear the hallmarks of a trial on guilt, so double jeopardy does not apply.

Other cases applying the *Bullington* "hallmarks of the trial on guilt or innocence" test to noncapital sentencing proceedings and finding such hallmarks absent include *Woodall* v. *United States* (8th Cir. 1995) 72 F.3d 77, 79-80 (interpreting federal Armed Career Criminal Act), *State* v. *Sowards* (Ariz. 1985) 709 P.2d 513, 515 (Arizona), *State* v. *Cobb* (Mo. 1994) 875 S.W.2d 533, 535, hereafter *Cobb* (Missouri),[3] *Fitzpatrick* v. *State* (Mont. 1981) 638 P.2d 1002, 1017

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[3] Although the lead opinion cites this case in support, and admittedly some language in the *Cobb* opinion suggests the court found Missouri's noncapital persistent offender law distinguishable from the sentencing scheme in *Bullington* on the ground the Missouri law did not involve the death penalty, the Missouri Supreme Court also had this to say: "In the sentencing of a persistent offender, the trial court's discretion is essentially unfettered. The judge has a wide range of punishment from which to choose and is not inhibited by explicit standards imposed by statute. In addition, as in DiFrancesco, the choice presented the trial judge in sentencing persistent offenders is far broader than that faced by a jury in sentencing a defendant to death. For the same reasons that Bullington is distinguishable from DiFrancesco, Pearce, Chaffin and Stroud, Bullington is distinguishable from this case. Therefore, applying the rationale of Bullington, double jeopardy does not attach to Missouri's noncapital persistent offender sentencing." (*Cobb*, *supra*, 875 S.W.2d at p. 535.) It thus appears the *Cobb* court

(footnote continued on next page)

(Montana), and *People* v. *Sailor* (1985) 491 N.Y.S.2d 112 (New York). (See also, *State* v. *Avila* (Ariz. 1985) 710 P.2d 440, 445-446 [quoting *Sowards* with approval]; cf. *State* v. *Ledbetter* (Conn. 1997) 692 A.2d 713, 717-718 [suggesting *Bullington* applies to state's noncapital persistent offender law, but concluding defendant waived the claim].) All of these cases recognize the applicable test in determining whether double jeopardy applies to bar retrial is whether the noncapital sentencing scheme bears sufficient similarity to a trial on guilt so that one can conclude, as in *Bullington*, that a not true finding operates as an "acquittal" of the sentencing allegation. (See, e.g., *Woodall* v. *United States*, *supra*, 72 F.3d at p. 79 [emphasizing government's burden of proof is only by a preponderance of evidence to conclude double jeopardy does not apply].)

The majority's attempt (lead opn., *ante*, p. 15; conc. opn. of Brown, J., *ante*, p. 3) to distinguish these cases wholesale as insufficiently impressed with the "unique nature and constitutional origins" of the death penalty is flawed, relying as it does on an unjustified embellishment of the Supreme Court's rationale in *Bullington*. Although *Bullington* involved a capital sentencing scheme, the mere possibility of the death penalty was not cited by the *Bullington* court as central to its rationale. As noted above, the Supreme Court of Washington has explicitly rejected the notion that *Bullington* was premised on the fact the death penalty was there involved. (See *Hennings*, *supra*, 670 P.2d at p. 260; see also *Linam* v. *Griffin* (10th Cir. 1982) 685 F.2d 369, 376-377 (conc. opn. of Anderson, J.) [fact death penalty was involved in *Bullington* was "not relied on nor even articulated

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applied the *Bullington* analysis to conclude Missouri's persistent offender law did not bear the hallmarks of a trial on guilt or innocence.

by the Supreme Court as a basis for its holding"].) To the extent the majority relies on this "death-penalty-only" view of *Bullington*, it relies on an augmentation of that decision's rationale that appears nowhere in the body of the opinion itself.

The majority relies on cases which, admittedly, find *Bullington* does not apply to noncapital sentencing proceedings. In addition to espousing the minority rule, however, many of these cases employ faulty reasoning or announce their interpretation of *Bullington* in dicta. For example, in *State* v. *Aragon* (N.M. 1993) 861 P.2d 948, cited by the lead opinion in support (lead opn., *ante*, p. 15), the New Mexico Supreme Court found that double jeopardy did not attach to New Mexico's habitual offender proceedings because the law does not create a substantive criminal offense. (See *id.*, pp. 950-951 ["we have determined that habitual offender proceedings do not involve a determination of guilt of *any offense*" (italics added)], 953 ["double jeopardy does not attach to the habitual offender proceeding . . . because . . . there was no prosecution of *an offense*" (italics added)].) This reasoning misreads *Bullington*, for, as explained, *ante*, the jury in the Missouri capital sentencing trial in *Bullington* also did not try a separate "offense." Instead, the *Bullington* jury was deciding between life or death as an appropriate sentence. Clearly, whether or not a sentencing scheme delineates an "offense" is not the test. Accordingly, *Aragon*'s reasoning is flawed.

Denton v. *Duckworth* (7th Cir. 1989) 873 F.2d 144 (hereafter *Denton*), also cited by the majority in support (lead opn., *ante*, p. 15; conc. opn. of Brown, J., *ante*, p. 3), contains the same analytical flaw (873 F.2d at p. 147 [Indiana's habitual offender statute "*does not create a separate offense* . . . ."], italics added), but is unpersuasive for a more basic reason. In *Denton*, the defendant was convicted of rape and was also found to be an habitual offender under Indiana law based on his conviction of four prior unrelated felonies. After his rape conviction, one of the four prior felony convictions was vacated by a different court. The state

moved to retry the habitual offender allegation with the remaining three prior felony allegations (only two were necessary), deleting the now-vacated conviction. In these circumstances, the court held retrial was permissible.

Denton thus does not present a situation in which the state, with all its resources, failed to present sufficient evidence to convict. Instead, the matter was one of trial error for which the federal double jeopardy clause is inapplicable. (*Burks*, *supra*, 437 U.S. at pp. 15-16.) As even the *Denton* court opined: "This clearly is a case of 'trial error,' and not of insufficiency of the evidence." (*Denton*, *supra*, 873 F.2d at p. 148.) Any discussion in *Denton* of the application of *Bullington* was thus dictum.

Linam v. *Griffin*, *supra*, 685 F.2d 369, also declares its interpretation of *Bullington* in dictum. In *Linam*, the Tenth Circuit Court of Appeals found a state appellate court's reversal of a noncapital sentence enhancement "meets the Burks Court's definition of trial error and is not a true finding of inadequacy of evidence." (*Id.*, at p. 373.) Because only trial error was present in *Linam*, no double jeopardy bar to retrial applied irrespective of that court's views on *Bullington*. (See generally, *Bohlen* v. *Caspari*, *supra*, 979 F.2d at p. 114 [concluding *Linam* and *Denton* are distinguishable as cases involving trial error and not insufficiency of evidence]; *Carpenter* v. *Chapleau* (6th Cir. 1996) 72 F.3d 1269, 1276 (dis. opn. of Moore, J.) [finding *Denton*'s and *Linam*'s discussion of *Bullington* to be dictum].) The majority's reliance on dicta in *Denton*, *supra*, 873 F.2d 144, and *Linam*, *supra*, 685 F.2d 369, is thus misplaced.

The majority rule emerging from the federal circuit courts and the high courts from our sister states is this: the test to determine whether the federal double jeopardy clause applies to bar multiple retrials of noncapital sentencing determinations is *Bullington*'s "hallmarks of the trial on guilt or innocence" test. The cases cited by the majority in support of its contrary position delineate a

minority rule, and are for the most part weakly reasoned or announce their interpretation of *Bullington* in dictum. Because I find the majority rule better reasoned and thus more persuasive, I would apply *Bullington*'s "hallmarks of the trial on guilt or innocence" test to the facts of this case.

C. Applying *Bullington* to This Case

Bullington found the federal double jeopardy clause applied to Missouri's capital sentencing hearing because that hearing bore the "hallmarks of the trial on guilt or innocence." The high court found it significant that the defendant enjoyed the right to a separate hearing and to a jury and that the jury was not granted broad discretion to choose an appropriate punishment, but was instead required to choose between two alternates authorized by statute. Perhaps most importantly, the prosecution bore the burden of establishing necessary facts beyond a reasonable doubt. "The presentence hearing resembled and, indeed, in all relevant respects was like the immediately preceding trial on the issue of guilt or innocence. It was itself a trial on the issue of punishment so precisely defined by the Missouri statutes." (*Bullington, supra*, 451 U.S. at p. 438.)

These same "hallmarks of the trial on guilt or innocence" apply to a trial on a sentence enhancement allegation. In such a hearing, the People bear the burden of proving the sentence enhancement beyond a reasonable doubt (*People* v. *Tenner, supra,* 6 Cal.4th at p. 566; see also, Pen. Code, § 1096 [applying standard of beyond a reasonable doubt to "criminal actions"]), and the defendant is entitled to a jury (Pen. Code, § 1025). The sentence enhancement must be pleaded and proved (see, e.g., Pen. Code, §§ 667, subd. (c); 1170.12, subd. (a), 667.5, subd. (d)), and the defendant must answer the charge in open court. (Pen. Code, § 1025; see also Pen. Code, § 969½ [requiring defendant be arraigned on a prior conviction allegation added to complaint after defendant has pleaded guilty].) The jury is limited to two alternatives (finding the allegation true or untrue) and is not

authorized to choose among a wider array of sentencing choices. The trial court has discretion to order a separate hearing to determine the truth of the prior convictions (*People* v. *Calderon, supra*, 9 Cal.4th 69), but in any event, the defendant is entitled to a contested "trial" on the enhancement allegations, including the right to present evidence.

This "trial" on sentence enhancement allegations may be profitably contrasted with a "traditional" sentencing hearing, in which the People bear no burden of proof, the trial court can receive evidence from outside of court (such as a probation report), the trial court wields broad discretion to fashion a sentence appropriate to the defendant's crime, and, of course, a defendant has no right to a jury. As in *Bullington*, the "trial" on the sentence enhancement allegation is for all intents and purposes identical to the preceding trial on the question of the defendant's guilt or innocence of the substantive criminal charges. Under these circumstances, *Bullington* compels the conclusion the federal double jeopardy clause applies to this case to bar retrial of defendant's prior felony conviction sentence enhancement.

II. Double Jeopardy Under the California Constitution

A. Relying on the California Constitution

Irrespective of whether the majority is correct regarding the nonapplicability of the federal double jeopardy clause to this case, I conclude retrial of the prior felony conviction allegation is prohibited by the state constitutional double jeopardy clause. (Cal. Const., art. I, § 15.) Our state counterpart to the federal double jeopardy clause first appeared in the California Constitution of 1849, article I, section 8, where the language tracked the federal guarantee. The provision was moved essentially unchanged to article I, section 13 in the California Constitution of 1879, and finally came to rest in article I, section

15, of the present California Constitution; it provides: "Persons may not twice be put in jeopardy for the same offense . . . ."

Article I, section 24 of the state charter, added by popular vote in 1974, is also relevant to our discussion; it provides: "Rights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution." That section was amended by Proposition 115 to state the following qualification: "In criminal cases the rights of a defendant to . . . not be placed twice in jeopardy for the same offense . . . shall be construed by the courts of this State in a manner consistent with the Constitution of the United States. This [state] Constitution shall not be construed by the courts to afford greater rights to criminal defendants than those afforded by the Constitution of the United States . . . ." This latter provision was invalidated, however, in *Raven* v. *Deukmejian* (1990) 52 Cal.3d 336 (hereafter *Raven*), as an improper revision of the state Constitution.

In light of the holding in *Raven* we remain free to continue our long-standing and constitutionally authorized practice, in appropriate situations, of interpreting our state Constitution to grant greater protection to state residents than would be afforded by the high court under the federal Constitution. It is true, as the lead opinion notes, that we have previously explained there must be "cogent reasons . . . before a state court construing a provision of the state Constitution will depart from the construction placed by the Supreme Court of the United States on a similar provision in the federal Constitution." (*Raven*, *supra*, 52 Cal.3d at p. 353, quoting *Gabrielli* v. *Knickerbocker* (1938) 12 Cal.2d 85, 89.) This admonishment finds no application here, however, for, as explained, *ante*, the Supreme Court has never ruled on the question whether the federal double jeopardy clause applies to noncapital sentence enhancements. There is thus no federal construction from which to depart.

Significantly, we most recently faced this federal versus state Constitution question in a case specifically posing a double jeopardy question; there, we reaffirmed that "the California Constitution is a document of independent force and effect that may be interpreted in a manner more protective of defendants' rights than the federal Constitution." (*People* v. *Fields* (1996) 13 Cal.4th 289, 298.)

Indeed, good reasons exist to rely on our state Constitution even before we consider whether the federal Constitution applies here. It is hornbook law that at the time the Bill of Rights was ratified in 1791, and until the 1920's, the Bill of Rights was not understood to apply against the states at all. (*Barron* v. *Baltimore* (1833) 32 U.S. (7 Pet.) 243.) Due to the selective nature of the incorporation doctrine, which arose in this century (see generally, Nowak & Rotunda, Constitutional Law (5th ed. 1995) § 10.2, pp. 339-342), application to the states of the various portions of the Bill of Rights was addressed judicially in a sequential manner. The federal constitutional guarantee not to be placed twice in jeopardy was not held applicable to state prosecutions until *1969*. (*Benton* v. *Maryland*, *supra*, 395 U.S. 784.) Until that year, we had always relied solely on our own state Constitution to protect our residents from being placed twice in jeopardy.

Moreover, other than the rather obscure provisions in article II, section 10 of the federal Constitution (prohibitions of ex post facto laws, bills of attainder, interference with contracts), the Constitution placed no limitation on states in the area of personal liberties until ratification of the Fourteenth Amendment in 1868, almost two decades after California was granted statehood. From this bit of history, we can draw two conclusions. First, "[f]or most of the life of this nation the Federal Constitution offered no protection for the personal, religious, intellectual and political rights of its citizens in their relations with state and local government. In California those protections were provided by the Declaration of

Rights — Article I of the California constitution — which contains provisions much like those of the Federal Bill of Rights." (Falk, *The Supreme Court of California 1971-1972, Foreword: The State Constitution: A More Than "Adequate" Nonfederal Ground* (1973) 61 Cal.L.Rev. 273, 274, capitalization in original [hereafter Falk article].) Second, and more important for our purposes, for the majority of this state's political life, *it has been the state, not federal, Constitution that protected the personal liberties — specifically the right to not be placed twice in jeopardy — of Californians.*

If we go back even further in history, we find that state constitutional protections of individual liberties are not even derived from the Bill of Rights; rather, the reverse is true. "The lesson of history is otherwise; indeed, the drafters of the federal Bill of Rights drew upon corresponding provisions in the various state constitutions. Prior to the adoption of the federal Constitution, each of the rights eventually recognized in the federal Bill of Rights had previously been protected in one or more state constitutions." (Brennan, *State Constitutions and the Protection of Individual Rights* (1977) 90 Harv.L.Rev. 489, 501 [hereafter Brennan article].) When drafting the Declaration of Rights in our state Constitution, first in 1849 and again in 1879, "the drafters largely looked to the constitutions of the other states, rather than the federal Constitution, as potential models." (*Raven, supra*, 52 Cal.3d at p. 353.) There is thus good reason to look first to our state Constitution for guidance.

In interpreting the extent of various rights of personal liberty, this court has in the past eschewed the federal document and relied on the state Constitution in two distinct situations. First, we sometimes relied on our state Constitution to diverge from the high court's interpretation of an analogous federal constitutional provision when we concluded the high court did not provide sufficient protection for individual liberties. For example, we held in *People* v. *Brisendine* (1975) 13

Cal.3d 528, 545-552, that a search incident to lawful arrest must be justified by a rule of reasonableness, contrary to the Supreme Court's decision in *United States* v. *Robinson* (1973) 414 U.S. 260, which held a search incident to lawful arrest was per se reasonable.[4] (See cases collected at *Raven, supra*, 52 Cal.3d at p. 354; see generally, Grodin, Massey & Cunningham, The California State Constitution (1993) pp. 21-26 & accompanying notes; Falk article, 61 Cal.L.Rev. at pp. 277-280 & accompanying notes.)

Although we invalidated in *Raven* that portion of Proposition 115 tying state constitutional interpretation to the federal Constitution, we nonetheless remain cognizant the electorate expressed displeasure with state constitutional interpretations that granted criminal defendants greater procedural rights than are required under the federal Constitution. Accordingly, although we remain free, in light of *Raven*, to continue to interpret the state Constitution more expansively than its federal counterpart, we have declared there must be "cogent reasons" to do so. (*Raven, supra*, 52 Cal.3d at p. 353.) Here, however, we are not presented with such a situation because, as explained *ante*, the United States Supreme Court has never ruled on the precise issue before us.

We are, rather, presented with the second type of situation in which we historically have interpreted the state Constitution to provide protection of individual liberties, namely, *when no United States Supreme Court authority had yet emerged.* For example, in an opinion by Justice Mosk, we held the California Constitution guaranteed the right to counsel for persons charged with

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[4] Of course, *Brisendine* and other state-law-based search-and-seizure cases were superseded by the enactment of Proposition 8. (See Cal. Const, art. I, § 28(d) [right to truth-in-evidence provision]; *In re Lance W.* (1985) 37 Cal.3d 873 [upholding same].)

misdemeanors. (*In re Johnson* (1965) 62 Cal.2d 325, 329.) At the time, no federal constitutional rule had yet emerged. Seven years later, the Supreme Court found a federal constitutional right to counsel in misdemeanor cases, at least where imprisonment was a possibility. (*Argersinger* v. *Hamlin* (1972) 407 U.S. 25.)

In the absence of federal constitutional authority binding us, we clearly are free to look to our state Constitution. Indeed, reliance on the state Constitution is preferable here, for not only has the United States Supreme Court never specifically ruled on the applicability of the federal double jeopardy clause to noncapital sentencing proceedings or sentence enhancements, it has had several opportunities to address the issue and has declined each time. (*Caspari*, *supra*, 510 U.S. 383, *Lockhart* v. *Nelson*, *supra*, 488 U.S. 33; *Hunt* v. *New York*, *supra*, 502 U.S. 964 (opn. of White, J., dis. from den. of cert.); see also *Carpenter* v. *Chapleau*, *supra*, 72 F.2d 1269, cert. den. ___ U.S. ___; 136 L.Ed.2d 61 (1996); *Wilmer*, *supra*, 30 F.3d 451, cert. den. 513 U.S. 970 (1994); *Denton*, *supra*, 873 F.2d 144, cert. den. 493 U.S. 941 (1989); *Durosko* v. *Lewis*, *supra*, 882 F.2d 357, cert. den. 495 U.S. 907 (1990); *Linam* v. *Griffin*, *supra*, 685 U.S. 369, cert. den. 459 U.S. 1211 (1983); *People* v. *Levin*, *supra*, 623 N.E.2d 317, cert. den. sub nom. *Levin* v. *Illinois*, 513 U.S. 826 (1994); *People* v. *Sailor*, *supra*, 491 N.Y.S.2d 112, cert. den. sub nom. *Sailor* v. *New York*, 474 U.S. 982 (1985).) Not only, therefore, are we left with no definitive holding from the high court, we cannot anticipate that court will soon resolve the question. This uncertain state of affairs provides "cogent reasons" (*Raven*, *supra*, 52 Cal.3d at p. 353), were they needed, for us to rely on our state Constitution. (See *Ex Parte Augusta*, *supra*, 639 S.W.2d at p. 485 [applying double jeopardy under Texas Constitution to noncapital sentencing proceeding]; *DeBussi* v. *State*, *supra*, 453 So.2d 1030, 1032-1033 [applying a *Bullington*-type analysis to conclude double jeopardy under the Mississippi Constitution barred retrial of habitual offender allegation].)

B. Double Jeopardy under the State Constitution

When double jeopardy principles are involved, history shows we have not felt compelled to walk in the footprints left by United States Supreme Court precedent. For example, in *Cardenas* v. *Superior Court* (1961) 56 Cal.2d 273, we held double jeopardy would preclude retrial following a mistrial granted over the defendant's objection. Although a retrial would have been allowed under the federal Constitution (*Gori* v. *United States* (1961) 367 U.S. 364), we simply stated: "[the federal] holding [in *Gori*] does not accord with the uniform construction placed by the court upon the jeopardy provision of the California Constitution. . . ." (*Cardenas*, *supra*, at p. 276.) We explicitly reaffirmed *Cardenas* in *Curry* v. *Superior Court* (1970) 2 Cal.3d 707, 715-716.

People v. *Henderson* (1963) 60 Cal.2d 482 (hereafter *Henderson*), is similar. In *Henderson*, the defendant was convicted, on his plea of guilty, of first degree murder and sentenced to life imprisonment. On appeal, the court reversed for trial court error in permitting the defendant to withdraw his original plea of not guilty. On remand, the defendant was again convicted; this time, he was sentenced to suffer the death penalty. On appeal in this court, the defendant argued imposition of the death penalty on retrial violated his right against double jeopardy as set forth in article I, then-section 13 of the state Constitution.

This court agreed. Noting that in *Stroud*, *supra*, 251 U.S. 15, the Supreme Court held the federal double jeopardy clause did not prohibit imposition of the death penalty after a retrial for a defendant originally sentenced to life imprisonment, this court found the state Constitution marked out a different path: "A defendant's right of appeal from an erroneous judgment is unreasonably impaired when he is required to risk his life to invoke that right. Since the state has no interest in preserving erroneous judgments, it has no interest in foreclosing

appeals therefrom by imposing unreasonable conditions on the right to appeal." (*Henderson*, *supra*, 60 Cal.2d at p. 497.)

The Supreme Court followed *Stroud* with *North Carolina* v. *Pearce*, *supra*, 395 U.S. 711, a 1969 noncapital case, holding a greater sentence after a retrial does not violate the federal due process clause. We again followed our own path, applying to noncapital cases the state constitutional double jeopardy rule set forth in *Henderson*, *supra*, 60 Cal.2d 482. (*People* v. *Hood* (1969) 1 Cal.3d 444, 459 [following *Henderson* but not mentioning *Pearce*].) As one Court of Appeal observed: "[a]lthough presented with . . . the opportunity to [overrule *Henderson*] . . . , the court has never retreated from the rationale or holding of *Henderson*." (*People* v. *Superior Court (Harris)* (1990) 217 Cal.App.3d 1332, 1337, citing inter alia, *People* v. *Collins* (1978) 21 Cal.3d 208, 216-217; *People* v. *White* (1976) 16 Cal.3d 791, 802; *People* v. *Serrato* (1973) 9 Cal.3d 753, 763-764, disapproved on other grounds in *People* v. *Fosselman* (1983) 33 Cal.3d 572, 583, fn. 1; *Curry* v. *Superior Court*, *supra*, 2 Cal.3d at pp. 716-717; *People* v. *Hood*, *supra*, 1 Cal.3d at p. 459.)

In *People* v. *Comingore* (1977) 20 Cal.3d 142, the defendant, who had stolen a car in California and driven it to Oregon, was convicted in Oregon of unauthorized use of a vehicle. Upon his release, he was prosecuted in California for grand theft auto based on essentially the same acts that gave rise to the Oregon conviction. Although the California prosecution would have been permissible under the high court's interpretation of the Fifth Amendment double jeopardy clause (see *Abbate* v. *United States* (1959) 359 U.S. 187), we held Penal Code section 793, a *statute* implementing double jeopardy principles, prohibited the California trial as it was predicated on the same facts that formed the basis of the Oregon trial. We did not expressly mention the state Constitution, but merely stated the rule in *Abbate* "does not preclude a state from providing greater double

jeopardy protection than is provided by the federal Constitution . . . ." (*Comingore*, *supra*, 20 Cal.3d at p. 145.) Although *Comingore* is not unequivocally a state *constitutional* (as opposed to state *statutory*) case, the principles at work seem congruent, especially because Penal Code section 793 merely implements the state constitutional double jeopardy guarantee.

In light of this court's strong history of relying on the state Constitution as a document of independent force in the double jeopardy area, I would rely on that document to resolve this case.

C. Applicability of State Double Jeopardy Principles to Sentence Enhancement Allegations

As the lead opinion concedes, we recently determined double jeopardy principles precluded retrial of a firearm use enhancement allegation, charged pursuant to Penal Code section 12022.5, where the defendant's jury had previously found the allegation not true. (*People* v. *Superior Court (Marks)* (1991) 1 Cal.4th 56, 78, fn. 22 [hereafter *Marks*]; cf. *People* v. *Santamaria* (1994) 8 Cal.4th 903, 910 ["The parties agree(d) that the jury's 'not true' finding on the knife-use enhancement allegation precludes retrial of that allegation"].) Noting the jury had found the allegation the defendant personally used a firearm "not true," we held "[t]he jury's rejection constituted an express acquittal on the enhancement and forecloses any retrial." (*Marks*, *supra*, 1 Cal.4th at p. 78, fn. 22.)

Because *Marks* is but a few years old and applied double jeopardy principles to a finding on a sentence enhancement, one might assume it provides relevant authority to decide this case. The lead opinion, however, posits two reasons why it believes *Marks* is irrelevant to the proper resolution of this case. First, the lead opinion opines that *Marks* relies on a line of cases that are based on a state constitutional rule of double jeopardy that precludes penalizing a defendant with a longer sentence following a successful appeal of his or her conviction.

(Lead opn., *ante*, pp. 18-19.)[5] Second, the lead opinion asserts that "because *Marks* included no analysis of the complex issues we address in this case, we think a narrow reading of *Marks* is appropriate." (Lead opn., *ante*, p. 19.)

The lead opinion's attempt to cabin the rationale in *Marks* founders because it fails to account for the *Marks* decision's emphasis on the fact the jury in that case found the enhancement allegation "not true," and *Marks's* characterization of this finding as an "acquittal." The concept of an acquittal clearly implicates the historic constitutional double jeopardy bar to retrial. Indeed, if the federal double jeopardy clause protects against anything, it "protects against a second prosecution for the same offense *after acquittal*." (*North Carolina* v. *Pearce, supra,* 395 U.S. 711, 717, italics added, fn. omitted.) "[I]t has long been settled under the Fifth Amendment that a verdict of *acquittal* is final, ending a defendant's jeopardy . . . ." (*Green* v. *United States, supra,* 355 U.S. at p. 188, italics added.) By emphasizing the jury found the enhancement allegation "not true" and characterizing the finding as an "acquittal," the *Marks* court was clearly invoking this "long-settled" constitutional doctrine.

Moreover, the *Henderson-Collins-Hood* line of cases (see fn. 5, *ante*) cited in *Marks*, does not prohibit any retrial at all, but merely limits the aggregate sentence to no more than was achieved in the first trial. Thus, in *Henderson, supra*, 60 Cal.2d 482, where the defendant was sentenced to life imprisonment following his first trial, we did not purport to prevent any retrial whatsoever; we merely held he could not be given the greater sentence of the death penalty

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[5] Such cases include *People* v. *Collins*, *supra*, 21 Cal.3d 208, 216-217, *People* v. *Hood*, *supra*, 1 Cal.3d 444, 459, *Henderson*, *supra*, 60 Cal.2d 482, 496-497, *People* v. *Pettaway* (1988) 206 Cal.App.3d 1312, 1331-1332, and *People* v. *Asbury* (1985) 173 Cal.App.3d 362, 366.

following retrial. Invoking the same rule in *People* v. *Hood, supra*, 1 Cal.3d 444, we permitted a retrial but limited the aggregate sentence to that achieved in the first trial. (*Id.*, p. 459.) If, as suggested by the lead opinion, *Marks* was based solely on the state constitutional right against imposition of a greater sentence on retrial following a successful appeal, the *Marks* opinion should have permitted a retrial. Instead, *Marks* concluded "[t]he jury's rejection [of the enhancement] constituted an express acquittal on the enhancement and *forecloses any retrial*." (*Marks*, *supra*, 1 Cal.4th at p. 78, fn. 22, italics added.) The lead opinion's belated attempt to redefine the meaning of *Marks* is thus unpersuasive.

Moreover, the lead opinion's restrictive reading of the double jeopardy clause of the California Constitution fails to address the following authorities, which pose analogous sentence enhancements and conclude double jeopardy applies: *People* v. *Brookins* (1989) 215 Cal.App.3d 1297, 1309 (double jeopardy precludes retrial of Pen. Code, § 667.7 habitual offender enhancement because it was reversed for insufficient evidence); *People* v. *Pettaway, supra,* 206 Cal.App.3d at p. 1332, reversed on other grounds *sub nom.*, *Pettaway* v. *Plummer* (9th Cir. 1991) 943 F.2d 1041 (state constitutional double jeopardy provision prohibits retrial of Pen. Code, § 12022.5 [personal firearm use] and Pen. Code, § 12022.7 [personal infliction of great bodily injury] enhancements following jury verdict enhancements were "not true" as to murder charge); *People* v. *Jones* (1988) 203 Cal.App.3d 456, 460, disapproved on another point, *People* v. *Tenner, supra,* 6 Cal.4th at p. 566, fn. 2 (double jeopardy precludes retrial of Pen. Code, § 667.5 prior felony conviction enhancement); *People* v. *Raby* (1986) 179 Cal.App.3d 577, 591 (double jeopardy precludes retrial of prior felony enhancement); and *People* v. *Bonner* (1979) 97 Cal.App.3d 573, 575 (double jeopardy prohibits reprosecution of narcotics weight enhancement allegation following appellate reversal for insufficient evidence); see also *People* v. *Guillen*

(1994) 25 Cal.App.4th 756 (reaffirming *Bonner*, but finding mistrial on weight enhancement does not preclude retrial); *People* v. *Reynolds* (1989) 211 Cal.App.3d 382, 390 (double jeopardy does not prevent retrial of serious felony enhancement under Pen. Code, § 667 because it was reversed for trial error and not for insufficient evidence).

It bears repeating that "the double jeopardy clause is no mere 'technicality'; it is an integral part of 'the framework of procedural protections which the Constitution establishes for the conduct of a criminal trial.' (*United States* v. *Jorn* [(1971)], *supra*, 400 U.S. [470] at p. 479 (plur. opn.).) Effectuating the spirit as well as the letter of its liberality, courts have 'disparaged "rigid, mechanical" rules in [its] interpretation . . . . [Citation.]' (*Serfass* v. *United States* [(1975)], *supra*, 420 U.S. [377] at p. 390.) In animating our own independent 'vital safeguard,' we have expressly refused to perpetuate 'spurious distinction[s]' at the risk of 'giving our constitutional prohibition against twice in jeopardy a "narrow, grudging application" unsupported by either logic or reason.' (*Gomez* v. *Superior Court* [(1958)], *supra*, 50 Cal.2d [640] at p. 649 . . . .)" (*Marks*, *supra*, 1 Cal.4th at p. 79.)

Perhaps a bit uncomfortable with its decision — understandably, since the specter of a defendant being retried innumerable times on the same allegations until the People finally succeed in proving them true is indeed disturbing — the lead opinion concludes by detailing a long list of what it is not deciding. It explains that although the People are not prohibited by double jeopardy principles from retrying the prior felony conviction enhancement, other limits might curtail the ability of the People on retrial to obtain a true finding. The lead opinion opines, for example, that on retrial the People cannot rely solely on the same evidence as initially presented, for even if the bedrock principle of double jeopardy does not apply to bar retrial, the more amorphous prudential principles of law of

the case will apply. The lead opinion, although it declines to elaborate, also suggests unspecified limitations might restrict such required additional evidence. Similarly, the lead opinion hints there may be due process limits in such a retrial. (Lead opn., *ante*, p. 21.) One can only guess what these intimations mean for future cases; what is clear is that for this defendant, on the facts of this particular case, retrial following acquittal is permitted.

Such legal contortions are unnecessary. Not only does this court have a long history of relying on the state constitutional double jeopardy clause rather than its federal counterpart, there is in this state an unbroken line of cases applying the double jeopardy principles to noncapital sentence enhancement allegations. The majority breaks from this history without persuasive reasons for doing so. Accordingly, I would find the Court of Appeal's decision that the People adduced insufficient evidence to prove the enhancement alleged pursuant to Penal Code sections 667, subdivisions (b)-(i) and 1170.12, subdivisions (a)-(d), prohibits retrial of the same enhancement allegation pursuant to article I, section 15 of the California Constitution. The People having had one good chance to prove the truth of the prior conviction allegation, they should now be barred by the state constitutional double jeopardy clause from a second chance to prove the same charge.

CONCLUSION

The lead opinion twice mentions the ease with which the People can prove a prior felony conviction such that it may be used to increase an offender's sentence: "a prior conviction trial," we are told, "is simple and straightforward," and "the outcome is relatively predictable." (Lead opn., *ante*, p. 13.) And again, repeating itself, the lead opinion declaims: "trial of a prior conviction allegation is relatively perfunctory, and the outcome is usually predictable." (*Id.*, at p. 21.) I

agree. Under such circumstances, I see no reason to do violence to double jeopardy principles merely to permit the People multiple opportunities to prove the existence of such prior convictions. I dissent.

WERDEGAR, J.

WE CONCUR:

MOSK, J.
KENNARD, J.

See next page for addresses and telephone numbers for counsel who argued in Supreme Court.

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Pend
9-4-97

APPENDIX B

PUBLISHER'S NOTE:

ORIGINAL PAGINATION IS NOT CONTINUOUS.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION 3

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent vs. ANGEL J. MONGE, Defendant and Appellant.	2d Criminal No.: B094905 Superior Court No.: KA025876

1-22-96

APPELLANT'S OPENING BRIEF

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ARGUMENT

I

THE TWO-STRIKES LAW DENIES APPELLANT'S RIGHTS TO DUE PROCESS, AS ITS CLASSIFICATIONS FAIL EVEN THE MOST MINIMAL RATIONAL RELATIONSHIP TEST.

The Two-Strikes law singles out certain repeat offenders for extra punishment. Its arbitrary and irrational application serves as the basis of the law's constitutional infirmity. Unlike repeat offenders whose crimes are of increasing seriousness, Two-Strikes gives additional punitive enhancement to the person whose crimes are of decreasing seriousness. It simply makes no sense, nor has any jurisdiction recognized decreasing seriousness of offenses as a rational basis for increased punishment. This is an arbitrary and capricious law.

The Legislature has (perhaps unwittingly) classified two-time offenders, who have committed the exact same offenses, depending on the **order** in which the offenses are committed. A person who commits a non-serious felony, with a prior serious felony conviction, automatically receives the doubled sentence and reduced credits of the Two-Strikes law. Another person who commits the exact same crimes, but commits a serious felony with a prior non-serious felony, isn't subject to the Two-Strikes law at all, and gets no doubled sentence or reduced credits for either conviction.

Appellant recognizes that the threshold of rationality required for minimal due process review is itself quite

minimal. But it doesn't exist at all here. Carving out these particular repeat offenders for extra punitive enhancements makes no sense. For such offenders, the Two-Strikes law operates in a manner that not only lacks a nonarbitrary rational basis, but is the exact opposite of one. It is an unconstitutional law as adopted, and cannot be permitted to stand.

A. Constitutional Requirements

The principles of substantive due process of law protect a person against arbitrary legislative action depriving him of life, liberty or property, even if the person is afforded the fairest of procedural safeguards. (Gray v. Whitmore (1971) 17 Cal.App.3d 1, 21.)[3]

Legislation that is arbitrary or otherwise lacks a real and substantial relation to the object sought to be obtained is prohibited under both federal and state Due Process Clauses. (Daniels v. Williams (1986) 474 U.S. 327, 331 [106 S.Ct. 662, 88 S.Ed.2d 662]; People v. Ramirez (1979) 25 Cal.3d 660, 663-664, 668; Goggin v. State Personnel Board (1984) 156 Cal.App.3d 96, 107.)

[3]"The federal and state Constitutions guarantee that no state shall deprive any person of life, liberty or property without due process of law. [Citation.]...Substantive due process prohibits governmental interference with a person's fundamental right to life, liberty or property by unreasonable or arbitrary legislation. [Citation.] In substantive due process law, deprivation of a right is supportable only if the conduct from which the deprivation flows is prescribed by reasonable legislation that is reasonably applied; that is, the law must have a reasonable and substantial relation to the object sought to be attained. [Citation.]" (In re Marilyn H. (1993) 5 Cal.4th 295, 306-307.)

Any given law's relation to a legitimate purpose must be substantial; if it only marginally serves legitimate interests, it cannot be upheld. (Griffin Development Co. v. Oxnard (1985) 39 Cal.3d 256, 272 [citing Moore v. City of East Cleveland (1977) 431 U.S. 494, 507 [97 S.Ct. 1932, 52 L.Ed.2d 531].)

It is inherent that a prison sentence directly affects a person's liberty. Accordingly, punishments which have the effect of increasing a person's prison sentence are subject to due process restrictions. (Wolff v. McDonnell (1974) 418 U.S. 539, 557 [94 S.Ct. 2963, 41 L.Ed.2d 935]; Morrissey v. Brewer (1972) 408 U.S. 471, 481-482 [92 S.Ct. 2593, 33 L.Ed.2d 484].)

B. Doubled Sentence

People who commit crimes of increasing seriousness are considered a greater danger than those who do not. The commission of crimes of increasing seriousness has long been recognized by our Judicial Council[4] as a factor in aggravation, warranting extra punishment. (California Rules of Court, Rule 421 (b)(2).) This rationally implements the directive that a sentencing scheme consider the degree of danger of the offender. (People v. Cheatham (1979) 23 Cal.3d 829; In re Rodriguez (1975) 14 Cal.3d 639, 654.)

[4]Other jurisdictions also recognize increasing seriousness of criminality as a sentence-aggravating factor. (See, e.g., Fla. Stat. section 921.001(8); RCW (Wash.) sections 13.40.020(12) and 13.40.160(1); State v. S.S. (1992) 67 Wash.App. 800, 817 [840 P.2d 891, 901]; State v. Hullaby (La. 1994) 641 So.2d 1094, 1097.)

The legislature has made no recognition that commission of crimes in decreasing order of seriousness warrant extra punishment, while crimes in increasing order of seriousness do not. Nor could there be such legislative recognition, if California Rules of Court, Rule 421(b)(2) has any rational basis at all.

It is inconceivable that any rational reason exists to justify why people whose convictions are in decreasing order of seriousness should receive more punishment than those people whose convictions are in increasing order of seriousness. Yet that is exactly what the Two-Strikes law does. It imposes an extra punitive enhancement of doubled sentences on people who have committed particular crimes in decreasing order of seriousness, which is **never** imposed on people who have committed the exact same crimes in increasing order of seriousness.

Prior to the enactment of the Two-Strikes law, Penal Code section 1192.7 characterized certain felonies as "Serious Felonies". As part of that requirement, two-time serious felony offenders were given enhanced sentences over all other two-time offenders who, either at present or in the past, committed "Non-Serious Felonies".[5] (Penal Code

[5]The serious felonies, needless to say, are more serious than the non-serious felonies. They "'differ from other types of offenses in many ways, including the reasons and motives of the criminal, the outrage and harm to the victim, and the potential for danger to the victim and society in general.' [Citation.]" (People v. Jacobs (1984) 157 Cal.App.3d 797, 804.)

section 667, subdivision (a).) The enhancement for a two-time serious felony offender was an additional five-year sentence. By contrast, a two-time offender who committed a non-serious felony, past or present, could only get a one-year enhancement. (Penal Code section 667.5, subdivision (b).)

Only people who had committed two serious felonies would be eligible for five-year enhancements. People who committed one serious felony and one non-serious felony, in any order, were not. This statutory scheme of five-year enhancements for two-time serious felony offenders presented no constitutional problem, and the order of the offenses was irrelevant.

Now, that is no longer true. Instead, we have the following paradigm: crimes in increasing order of seriousness receive the normal range of prison terms. The second offense receives a normal range of prison terms, plus possibly a one-year enhancement for a prior prison term (if there is one).

Crimes in decreasing order of seriousness, however, are penalized more severely. The first offense receives the normal range of prison terms. The second offense receives **double** the normal range of prison terms, plus possibly a one-year enhancement for a prior prison term (if there is one).[6]

[6]The one-year enhancement is not doubled. (People v. Ramirez (1995) 33 Cal.App.4th

While the goal of the Legislature in its enactment of the Two-Strikes law may have been premised upon rational concerns (having repeat serious offenders on our streets), the current status is not the proper means to an end. It serves no purpose for a person whose crimes are in decreasing order of seriousness to receive a doubled sentence, while a person whose crimes are in increasing order of seriousness does not. This disparity is part of the statutory scheme on its face, and it doesn't make any sense.

People who commit the same crimes should be subject to the same sentences if there is no rational reason to make them subject to different ones. It would undoubtedly be rational to make the increasing serious offender subject to extra punishments that the decreasing seriousness offender would not receive. There is no rational reason to do it the other way around.

The rational basis test requires that a statutory classification must have a rational relationship to a legitimate state purpose. (Del Monte v. Wilson (1992) 1 Cal.4th 1009, 1014.) The classification must also have a fair and substantial relationship to the consequences that are made to flow from it. (Brown v. Merlo (1973) 8 Cal.3d 855, 861, 865.) There must be a "serious and genuine

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559 [five-year enhancement must be imposed on top of doubling of sentence under Two-Strikes law, but is not itself doubled].)

judicial inquiry into the correspondence between the classification and the legislative goals." (Cooper v. Bray (1978) 21 Cal.3d 841, 848.) Any classification must be "founded upon pertinent and real differences, as distinguished from irrelevant and artificial ones." (Miller v. Union Bank & Trust Co. (1936) 7 Cal.2d 31, 34-35.)

In other words, there must be a rational basis for separating the class of persons who have committed exactly the same types of offenses - one serious felony, and one non-serious felony - into subclasses depending on the order in which they committed their offenses.

The legislative intent behind the Two-Strikes law, stated in the statute, is "to ensure longer prison sentences and greater punishment for those who commit a felony and have been previously convicted of serious and/or violent felony offenses." (Penal Code section 667, subdivision (b); People v. Brady (1995) 34 Cal.App.4th 65, 71.)[7]

There is simply no rational relationship between this statute and the permissible legislative purpose of greater sentences for repeat offenders. True, this statute does give greater sentences for some repeat offenders. But

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[7]As applied to singling out out some two-time offentders for extra punishment, this means "The intent of the Legislature is to do what the statute does." A tautology is not a constitutionally acceptable reasonable relation between the statute and a permissible legislative purpose. (If it were, the rational relationship test would always be satisfied by every legislation, which is certainly not the case. See, e.g., Hale v. Morgan (1978) 22 Cal.3d 388, 397-403; Department of Mental Hygiene v. Hawley (1963) 59 Cal.2d 247, 256.)

shouldn't the rational relationship take into consideration all that it covers? Why these repeat offenders, and not others - especially when those certain others may very well pose a much greater danger to society?

Doesn't it matter if those who commit offenses in an increasing order of seriousness, present a greater harm (or at least an equivalent harm) than those who commit the same offenses in a decreasing order of seriousness? At the very least, there would be no rational basis for concluding that the increasing seriousness defendants present a lesser harm than the decreasing seriousness defendants. Then why are those who commit offenses in decreasing order of seriousness the only ones who get a doubled penalty?

The current status of the Two-Strikes law is inherently irrational, arbitrary, and unconstitutional. It makes as much sense as giving extra punishment to people who commit lesser crimes, or to people with lesser criminal histories - which is, no sense at all.[8]

The unconstitutionality appears in this case as well, since it appears in every Two-Strikes case involving a non-serious felony with a serious felony prior. Appellant received a doubled sentence for his non-serious felony

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[8]It has also been recognized elsewhere that there are constitutional infirmities with imposing greater penalties on offenders whose acts are less serious. (See, e.g., People v. Suazo (Colo. Ct. App. 1993) 867 P.2d 161, 164 [statutory denial of defense to lesser-included offense which was granted to person charged with greater offense]; Roberts v. Collins (4th Cir. 1976) 544 F.2d 168, 169-70 [greater sentence for lesser-included offense than for greater offense]; Hobbs v. State (1969) 253 Ind. 195 [252 N.E.2d 498][same].)

conviction - using a minor to transport or sell marijuana - because he had a prior serious felony conviction. He would not have had the non-serious felony sentence doubled had he committed the non-serious felony first. Appellant received a doubled sentence for committing crimes in decreasing order of seriousness, whereas there would have been no doubling for crimes in increasing order of seriousness. There is no way to justify such a statutory scheme.

Because this classification fails even a minimal rational relationship test, it violates appellant's right to due process of law. Consequently, appellant's doubled sentence is constitutionally infirm and cannot be permitted to stand.

C. Sentence Credits

Sentence credits also directly affect the length of a person's prison sentence, and thus are just as amenable to due process as the original sentence itself. (Wolff v. McDonnell, supra.) Accordingly, the same constitutional infirmities that plague a doubling of the non-serious felony sentence under the Two-Strikes law also exist as to the sentencing credits provision.

The person whose crimes are in increasing order of seriousness is eligible for full one-for-one sentence credits. (Penal Code section 2933.) The person whose crimes are in decreasing order of seriousness, by contrast, get a maximum of one-for-four sentence credits. (Penal Code

sections 667, subdivision (c), subsection (5) and 1170.12, subdivision (a), subsection (5).)

Once again, this irrationally and arbitrarily singles out people whose offenses are in decreasing order of seriousness for extra punishment. This makes a bad unconstitutional situation worse, particularly since the more dangerous offenders (increasing seriousness) are not subject to the severely increased sentence (i.e., severely diminished credits).

At the very least, there is no rational relationship between making the two-time offenders with crimes of decreasing seriousness subject to an extra sentence (i.e., denial of sentencing credits) that increasing serious offenders never get, and any permissible legislative purpose.

As set forth in the previous argument, the provision relating to sentence credits similarly violates federal and state constitutional guarantees of due process of law. Appellant should therefore be entitled to one-for-one sentencing credits.

CONCLUSION

The will of our voters and our legislators is clear, but no matter how clear it is, it cannot trammel on the Constitution. The judicial system is the only mechanism available as a check and balance against that possibility, which is a reality in this case. One of the most important functions of the courts is to uphold the Constitution against inadvertent incursion by other branches of government.

Appellant respectfully asks this Court to perform exactly that function, because the challenged legislation is flatly unconstitutional. There are two ways this legislation could have been written to pass constitutional muster. One would have been to limit the Two-Strikes laws to repeat serious felons. There would have been no arbitrary extra punishment to only some offenders, and no classifications. The other option might have been to broaden the law, by making every person who had committed a single serious felony at any time eligible for Two-Strikes treatment, irrespective of the order of the offenses. The legislation does not say either of these things.

Moreover, this Court cannot rewrite the Two-Strikes law, and cannot narrow it in a manner that would eliminate the unconstitutionality of the classifications as they apply to appellant. It can only excise the unconstitutional doubling and reduced time credit provisions in his sentence.

For all these reasons, appellant respectfully asks this Court to vacate his sentence, and remand for resentencing without regard to the provisions of Penal Code section 667, subdivisions (c)(5) and (e)(1), and section 1170.12, subdivisions (a)(5) and (c)(1).

DATED:

Respectfully Submitted;

David H. Pierce
Attorney for Appellant

Proof of Service

I declare that I am over the age of eighteen, a citizen of the United States, and not a party to this action. I served the attached

APPELLANT'S OPENING BRIEF

on each of the following, by placing a true copy thereof in a sealed envelope with postage fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California that the above is true.

Executed this 22nd day of January, 1996, Los Angeles, California.

Declarant

APPENDIX C

DANIEL P. POTTER
Chief Deputy

OFFICE OF THE CLERK
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June 7, 1996

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Re: *The People* v. *Angel Jaime Monge,*
2d Crim. No. B094905
(Los Angeles Super. Ct. No. KA025876)

Dear Counsel:

The record in this case reflects the presence of an issue not discussed by the parties. Counsel are therefore requested to file supplemental letter briefs discussing the question of whether there was *sufficient evidence* to support the finding by the court that appellant suffered a prior felony conviction pursuant to Penal Code sections 667, subdivisions (b) through (i), and 1170.12, subdivisions (a) through (d).

In particular, the parties are requested to discuss whether there was sufficient evidence that, as to the felonious assault of which appellant was convicted in 1992 in case No. KA013241, appellant *personally* inflicted great bodily injury within the meaning of Penal Code section 1192.7, subdivision (c)(8), and/or *personally* used a dangerous or deadly weapon within the meaning of Penal Code section 1192.7, subdivision (c)(23), to the extent either subdivision is relied

upon to establish that he suffered a prior felony conviction within the meaning of Penal Code sections 667, subdivision (d)(1) and 1170.12, subdivision (b)(1).

The parties may wish to consider *People* v. *Reed* (1996) 13 Cal.4th 217, 220-231; *People* v. *Guerrero* (1988) 44 Cal.3d 343, 355, 356, fn. 1; *People* v. *Piper* (1986) 42 Cal.3d 471, 475-478; *People* v. *Equarte* (1986) 42 Cal.3d 456, 459, 466; *People* v. *Jackson* (1992) 7 Cal.App.4th 1367, 1370-1373; *People* v. *Goodner* (1992) 7 Cal.App.4th 1324, 1328-1333; *People* v. *Abarca* (1991) 233 Cal.App.3d 1347, 1349-1351; *People* v. *Williams* (1990) 222 Cal.App.3d 911, 914-918; and *People* v. *Smith* (1988) 206 Cal.App.3d 340, 345, fn. 8.

The requested letter briefs should be filed with this court and served on opposing counsel by no later than 5:00 p.m. on June 17, 1996.

Very truly yours,

JOSEPH A. LANE, Clerk

By D Gavinski
Masumi Gavinski
Deputy Clerk

jbc

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June 17, 1996

Presiding Justice Joan Dempsey Klein
and Associate Justices
California Court of Appeal
Second Appellate District, Division Three
Second Floor, North Tower
300 South Spring Street
Los Angeles, California 90013

RE: People v. Angel Jaime Monge
2d Crim. No. B094905; Our No. LA95DA2024

Dear Presiding Justice Klein and Associate Justices:

REMAND IS WARRANTED IN VIEW OF OUR SUPREME COURT'S VERY RECENT DECISION IN *PEOPLE* V. *REED* (1996) 13 CAL.4TH 217

On its own motion, this Court has ordered the parties to discuss "whether there was *sufficient evidence* to support the finding by the court [RT 238; CT 87] that appellant suffered a prior felony conviction pursuant to" the Three Strikes Law (Pen. Code,[1] §§ 667, subds. (b) through (i) [legislative version], 1170.12, subds. (a) through (d) [voter's initiative]). (Letter from Deputy Clerk Masumi Gavinski to the parties dated June 7, 1996, original italics.) The information alleged appellant suffered a 1992 assault with a deadly weapon conviction within the meaning of the Three Strikes Law. (CT 16.) The abstract of judgment concerning the prior, which was admitted into evidence as an exhibit in the instant case, states appellant pled guilty to the crime "ADW GBI [Pen. Code, § 245, subd. (a)(1)," on July 2, 1992. (CT 85.) This Court's letter to the parties states:

> "In particular, the parties are requested to discuss whether there was sufficient evidence that, as to the felonious assault of which appellant was convicted in 1992 in case No. KA013241, appellant *personally* inflicted great bodily injury within the meaning of Penal Code section 1192.7, subdivision (c)(8), and/or *personally* used a dangerous or deadly weapon within the meaning of Penal Code section 1192.7,

1. All further statutory references are to the Penal Code unless otherwise indicated.

> subdivision (c)(23), to the extent either subdivision is relied upon to establish that he suffered a prior felony conviction within the meaning of Penal Code sections 667, subdivision (d)(1) and 1170.12, subdivision (b)(1) [the Three Strikes Law]." (Original Italics.)

With respect to the prosecution's burden to prove a defendant suffered a "serious felony" within the meaning of the felonies listed in section 1192.7, subdivision (c), our Supreme Court has held under the so-called "the *Guerrero* rule" [*People* v. *Guerrero* (1988) 44 Cal.3d 343]: "[T]he trier of fact may look to the entire *record of conviction* to determine the substance of the prior conviction." (*People* v. *Reed* (1996) 13 Cal.4th 217, 223, original italics (citing *People* v. *Guerrero, supra*, 44 Cal.3d at p. 355).) The *Reed* court stated: "In *Guerrero* we declined to address any question regarding 'what items in the record of conviction are admissible and for what purposes.'" (*People* v. *Reed, supra*, 13 Cal.4th at p. 223, footnote omitted (citing *People* v. *Guerrero, supra*, 44 Cal.3d at p. 356, fn. 1); *People* v. *Abarca* (1991) 233 Cal.App.3d 1347, 1350 [discusses and cites authority concerning this issue]; *People* v. *Williams* (1990) 222 Cal.App.3d 911, 916 [same].) *Reed* held excerpts from a preliminary hearing transcript are admissible under the former testimony exception (Evid. Code, § 1291) to the hearsay rule (Evid. Code, § 1200) to prove the substance of a prior conviction (*People* v. *Reed, supra*, 13 Cal.4th at pp. 220, 225-229),[2] but excerpts from a probation report are inadmissible hearsay and thus may not be used to prove the substance of a prior conviction (*People* v. *Reed, supra*, 13 Cal.4th at pp. 230-231).[3]

As to the 1992 assault conviction in Case No. KA013241, it would appear there is nothing in the record which proves appellant *personally* inflicted great bodily injury within the meaning of subdivision (c)(8) of section 1192.7 and/or used a dangerous or deadly weapon within the meaning of subdivision

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2. The *Reed* court stated: "We conclude the [preliminary hearing] transcript was part of the record of the prior conviction" (*People* v. *Reed, supra*, 13 Cal.4th at 223), and stated: "The certified transcript, introduced to prove the events of the prior proceeding, was within the exception for official records (Evid. Code, § 1280; *People* v. *Abarca* [(1991)] 233 Cal.App.3d 1347, 1350); indeed, the transcript is, by statute, deemed prima facie evidence of the prior testimony. (Code Civ. Proc., § 273.)" (*People* v. *Reed, supra*, 13 Cal.4th at p. 225).

3. The *Reed* court declined to state whether the probation officer's report is "part of the record" of the prior conviction. (*People* v. *Reed, supra*, 13 Cal.4th at 230.)

(c)(23) of section 1192.7.[4] (See RT 189-193, 238; CT 85 [the abstract of judgment from the 1992 assault conviction], 87, 94 [excerpt from the probation report][5].) While its true the abstract of judgment of the 1992 proceeding indicates appellant's "ADW GBI" conviction was obtained pursuant to a guilty plea (CT 85), the law is clear: Absent a valid admission that a prior conviction was a serious felony, proof of a prior conviction establishes only the minimum elements of the crime and the prosecution cannot go behind the record of the conviction and relitigate the circumstances of the offense to prove some fact which was not an element of the crime. (*People* v. *Piper* (1986) 42 Cal.3d 471, 475, citation omitted.) The court in *People* v. *Equarte* (1986) 42 Cal.3d 456, stated: "[A]n assault-with-a-deadly-weapon conviction may constitute a 'serious felony' within the relevant statutes if the prosecution properly established that the defendant 'personally used a dangerous or deadly weapon' in the commission of the offense (§ 1192.7, subd. (c)(23))." (*Id.*, at p. 459.) "[S]imple assault with a deadly weapon is not

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4. Respondent notes, however, appellant did not object to the following argument made by the prosecutor to the court: "In the prior case that the defendant pled guilty to, KA012341, it was alleged in count I that he committed a crime of assault with a deadly weapon, to wit, a stick upon the victim of Miss Garcia. And there was no other defendants in that case. And, in fact, the defendant pled guilty to it, in which case he personally used the deadly weapon, a stick upon the victim in the case, which would make it a serious felony according to 1192.7, also People v. Arwood [sic]." (RT 189-190.)

5. Appellant has *waived* any hearsay objection to the use of the probation report to prove he *personally* inflicted great bodily injury and/or used a dangerous or deadly weapon within the meaning of subdivision (c) of section 1192.7. This is so because "there is a general rule against considering points on appeal not raised in the trial court. [Citation.]" (*In re Andre P.* (1991) 226 Cal.App.3d 1164, 1169; see *Burden* v. *Snowden* (1992) 2 Cal.4th 556, 570; *People* v. *Chi Ko Wong* (1976) 18 Cal.3d 698, 724-725 [defendant waived due process claim his sentence was improperly aggravated].) Indeed, the *Reed* court held as it did after noting: "Defendant unsuccessfully objected to both documents [the preliminary hearing transcript excerpts and the probation report excerpts] on grounds of hearsay and lack of foundation." (*People* v. *Reed, supra*, 13 Cal.3d at p. 221.) By contrast, appellant did not object in the trial court to the use of the probation report on hearsay grounds. Thus, he is precluded from raising that objection on appeal. (See Evid. Code, § 353.)

one of the offenses specifically named in section 1192.7, subdivision (c)[.]" (*Id.*, at p. 466.)[6]

Accordingly, in light of the fact our Supreme Court decided *People* v. *Reed*, *supra*, 13 Cal.4th 217, *after* briefing in the instant case, respondent submits this case should be remanded so that the People may properly prove beyond a reasonable doubt,[7] either through excerpts from the preliminary hearing transcripts (*People* v. *Reed*, *supra*, 13 Cal.4th at pp. 225-229) or through an admission by appellant which may be recorded in the probation report in Case No. KA013241 (*People* v. *Goodner*, *supra*, 7 Cal.App.4th at pp. 1328-1332; *People* v. *Garcia* (1989) 216 Cal.App.3d 233, 236-238; *People* v. *Williams*, *supra*, 222 Cal.App.3d at pp. 916-917),[8] that appellant *personally* inflicted great bodily injury within the meaning of subdivision (c)(8) of section 1192.7 and/or used a dangerous or deadly weapon within the meaning of subdivision (c)(23) of section 1192.7 in Case No. KA013241 (see RT 189-190). (See *In re Moser* (1993) 6 Cal.4th 342, 345 ["Under these circumstances, we conclude that this matter should be remanded to the superior court to provide both parties the opportunity to present evidence relevant to these issues, and to enable the superior court to consider petitioner's

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6. Compare *People* v. *Jackson* (1992) 7 Cal.App.4th 1367, 1371-1373 ["No other evidence was offered. The evidence was sufficient to prove appellant was convicted of second degree burglary, a felony. It was utterly insufficient to prove that the burglary appellant was convicted of concerned 'an inhabited dwelling house' . . . "] to *People* v. *Goodner* (1992) 7 Cal.App.4th 1324, 1333 ["the probation report from 69112 contains defendant's admissions that he and his accomplice chose to burglarize a 'home' and that they were inside the 'residence' for about five minutes when defendant poured some vodka from a flask while his accomplice ransacked the home, from which they then stole money and jewelry"] ["Defendant's admissions of what he did in the house, what was inside the house, including the fact that there was an identifiable 'bedroom,' and what he and his accomplice took from the house, provided evidence from which a rational trier of fact could make an inference of residence"].

7. "[T]he state must prove the elements of a prior conviction enhancement true beyond a reasonable doubt." (*People* v. *Williams*, *supra*, 222 Cal.App.3d at p. 915)

8. See, e.g., *People* v. *Abarca*, *supra*, 233 Cal.App.3d at pp. 1349-1351 [reporter's transcript of Abarca's plea in his prior conviction properly used to prove that conviction was a "serious felony"]; *People* v. *Smith* (1988) 206 Cal.App.3d 340, 345 [guilty plea waiver form signed by defendant in which he acknowledged the facts underlying the prior conviction properly used to prove that conviction was a "serious felony"].

claim in light of the governing legal principles set forth in this opinion"]; *People* v. *Goodner*, *supra*, 7 Cal.App.4th at p. 1330 ["Upon remand in the case at bar, the probation report was admitted pursuant to our holding in *Goodner I*; the trial court allowed as admissions only defendant's statements regarding the nature of the prior offense while other hearsay in the report was excluded"]; but see *People* v. *Williams*, *supra*, 222 Cal.App.3d at p. 918 ["the proper remedy is to strike the enhancement"]; accord, *People* v. *Jackson*, *supra*, 7 Cal.App.4th at pp. 1373-1374.) There are no double jeopardy obstacles to remand in the instant case. (See *People* v. *Saunders* (1993) 5 Cal.4th 580, 596-597 ["We hold that, because determination of the truth of the alleged prior convictions was bifurcated from the trial of the current charges, the court's action in conducting further proceedings to determine the truth of those allegations, following discharge of the jury that returned the guilty verdict, did not violate the double jeopardy clause of either the United States Constitution or the California Constitution"]; *People* v. *Torres* (1996) 45 Cal.App.4th 640, 644 ["We also conclude the People are not barred by double jeopardy from proceeding on the [prior "strike"] allegations on remand"].)

Respectfully submitted,

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DECLARATION OF SERVICE BY MAIL

Re: Peo. v. Angel Jaime Monge , No. B094905

I, the undersigned, certify and declare that I am a resident of the United States, over 18 years of age, a resident of the County of Los Angeles, and not a party to the within cause; my business address is 300 So. Spring St., Los Angeles, California, 90013.

On June 17, 1996, I served a copy of:

LETTER DATED JUNE 17, 1996, TO HONORABLE JOAN DEMPSEY KLEIN, PRESIDING JUSTICE, AND ASSOCIATE JUSTICES, CALIFORNIA COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION THREE, 300 SOUTH SPRING STREET, LOS ANGELES, CA 90013.

to the following, by placing same in an envelope addressed as follows:

David H. Pierce, Esq.
P.O. Box 641192
Los Angeles, CA 90064

Said envelope was then sealed and deposited in the United States Mail at Los Angeles, California, the county in which I am employed, with the postage thereon fully prepaid.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 17, 1996, at Los Angeles, California.

Declarant

CNH:ccg
LA95DA2024

APPENDIX D

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

ANGEL JAIME MONGE,

Defendant and Appellant.

B094905

(Super. Ct. No. KA025876)
(Sam Cianchetti, Judge)

THE COURT:*

Angel Jaime Monge appeals from the judgment entered following his convictions by jury of use of a minor to sell or transport marijuana, sale or transportation of marijuana, and possession of marijuana for sale, with a court finding that he suffered a prior felony conviction and a prior felony conviction for which he served a separate prison term. (Health & Saf. Code, §§ 11359, 11360, subd. (a), 11361, subd. (a); Pen. Code, §§ 667, subd. (d), 667.5, subd. (b).) He was sentenced to prison for 11 years and

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*CROSKEY, Acting P.J., ALDRICH, J., and RECANA, J.**

** Judge of the Municipal Court sitting under assignment by the Chairperson of the Judicial Council.

contends: "The Two-Strikes Law denies appellant's rights to due process. as its classifications fail even the most minimal rational relationship test."

FACTUAL SUMMARY

Viewed in accordance with the usual rules on appeal (*People* v. *Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence established that on January 25, 1995, appellant sold or transported marijuana in Pomona, using a minor to do so, and, after the transaction, possessed other marijuana for sale. In defense, appellant presented evidence that the offenses were not committed.

DISCUSSION

There was insufficient evidence that appellant suffered a prior felony conviction within the meaning of Penal Code sections 667, subdivision (d) and 1170, subdivision (b)(1).

Appellant contends Penal Code section 667, subdivisions (b) through (i) denies appellant's rights to due process, as that section's classifications fail even the most minimal rational relationship test. However, there is no need to decide that issue.

We have requested, and received, supplemental briefing on the issue of whether there was sufficient evidence to support the finding by the court that appellant suffered a prior felony conviction pursuant to Penal Code sections 667, subdivisions (b) through (i), and 1170.12, subdivisions (a) through (d).[1] Appellant contends, in essence, that the evidence was insufficient. We conclude the contention is well-taken.

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1 In particular, we requested the parties to discuss whether there was sufficient evidence that, as to the felonious assault of which appellant was convicted in 1992 in case No. KA013241, appellant *personally* inflicted great bodily injury within the meaning of Penal Code section 1192.7, subdivision (c)(8), and/or *personally* used a dangerous or deadly weapon within the meaning of Penal Code section 1192.7, subdivision (c)(23), to the extent either subdivision is relied upon to establish that he suffered a prior felony conviction within the meaning of Penal Code sections 667, subdivision (d)(1) and 1170.12, subdivision (b)(1).

The amended information alleged that appellant suffered a July 2, 1992, conviction for "ASSAULT WITH A DEADLY WEAPON in violation of [Penal Code] section 245(a)(1)" in case No. KA013241 pursuant to Penal Code sections 667, subdivisions (b) through (i), and 1170.12, subdivisions (a) through (d).[2] At the court trial on the allegation, the court stated that "the only evidence to be considered by the court is the *conviction* which the court will take judicial notice of in case number [KA013241]." (Italics added.) The People proffered People's exhibit No. 1, a Penal Code section 969b prison packet dated February 17, 1995. That exhibit reflects appellant was previously convicted as indicated above for felonious assault. The exhibit characterized the crime as "245 (a)(1) . . . ADW GBI" and "ASLT W/DW (245(a)(1)PC)."[3] People's exhibit No. 1 was "received in evidence."[4] The court found true that appellant suffered "the prior felony . . . . The felony being personal use of a deadly weapon in violation section 245, 245(a)(1)." Appellant was sentenced to prison for 11 years, consisting of a 10-year middle term pursuant to Penal Code section 667, subdivision (e)(1) for using a minor, plus 1 year pursuant to Penal Code section 667.5, subdivision (b). He also received a concurrent two-year term for the possession of marijuana for sale conviction, and punishment on his conviction for the sale or transportation of marijuana was stayed pursuant to Penal Code section 654.[5]

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2 That prior conviction was also the basis for the Penal Code section 667.5, subdivision (b) enhancement.

3 Appellant acknowledged the People had shown the exhibit to appellant before trial.

4 The June 12, 1995, minute order pertaining to the court trial reflects, "People's exhibit 1-department of corrections document is received in evidence." No other court trial evidence is referred to in the minute order.

5 At sentencing, the court stated that the issue of the prior conviction was submitted based upon the prison packet and "evidence contained in [the] court file . . . ."

Based on the above, the court's true finding that appellant suffered a prior felony conviction pursuant to Penal Code sections 667, subdivisions (b) through (i), and 1170.12, subdivisions (a) through (d), was based on insufficient evidence. A review of People's exhibit No. 1 reveals that, although it reflects the above indicated prior felonious assault conviction, the exhibit does not expressly state whether appellant *personally* inflicted great bodily injury within the meaning of Penal Code section 1192.7 subdivision (c)(8), or whether he *personally* used a dangerous or deadly weapon within the meaning of Penal Code section 1192.7, subdivision (c)(23). The omissions, insofar as People's exhibit No. 1 is concerned, are fatal. Nor does the fact that the court took judicial notice of the bare "conviction"[6] supply the requisite proof. (*People* v. *Piper* (1986) 42 Cal.3d 471, 475-478; see *People* v. *Equarte* (1986) 42 Cal.3d 456, 459, 466; *People* v. *Jackson* (1992) 7 Cal.App.4th 1367, 1370-1373; *People* v. *Williams* (1990) 222 Cal.App.3d 911, 914-915.)[7]

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6 As mentioned, during the court trial the court stated, "the only evidence to be considered by the court is the conviction which the court will take judicial notice of in case number [KA013241]." Although the court referred here to "evidence," we view that reference as informal, and further view the court's statement only as a taking of "judicial notice" of the conviction. The only item that the People formally proffered as "evidence" was People's exhibit No. 1. This was the only item appellant acknowledged having been shown by the People before trial, and was the only item to which he objected. Moreover, People's exhibit No. 1 was the only item the court expressly stated had been received in "evidence," and was the only item referred to as "evidence" in the pertinent minute order.

7 The court's sentencing comment that the prior conviction issue was submitted based in part upon "*evidence* contained in [the] court file" does not compel a contrary conclusion. First, the *comment* was post-trial and may not be relied upon; the People were required to *prove* the prior conviction allegation *at trial*. (*People* v. *Jackson, supra,* 7 Cal.App.4th at pp. 1370-1373.) Second, we view the above quoted comment as an informal reference to the fact that, at the court trial, the court took judicial notice of the fact of the prior conviction from the court file pertaining to that prior conviction. The only "evidence" at the court trial was People's exhibit No. 1. (See fn. 6, *supra*.) We note

We are not confronted with the issue of whether the trial court would have been entitled to look beyond the judgment to the entire record of conviction to determine the truth of the enhancement. Clearly this would have been permissible. (*People* v. *Guerrero* (1988) 44 Cal.3d 343, 345, 355-356.) However, *Guerrero* did not hold Penal Code section 1025 no longer requires that when a defendant denies having suffered an alleged prior conviction, the issue, if jury is waived, must be "tried" by the court. *Guerrero*, in short, did not hold the People were no longer obligated to prove their case. In fact, *Guerrero* expressly declined to decide what items in a record of conviction were "admissible" (*People* v. *Guerrero*, *supra*, 44 Cal.3d at p. 356, fn. 1), thus using an *evidentiary* term. Accordingly, we conclude the court erred by finding true the allegation that appellant suffered a prior felony conviction pursuant to Penal Code sections 667, subdivision (d)(1), and 1170.12, subdivision (b)(1), and by imposing sentence accordingly.

Respondent argues in its supplemental brief that this case should be remanded for a retrial on the prior conviction allegation. We disagree. The fact that *People* v. *Reed* (1996) 13 Cal.4th 217, was decided after the present case was fully briefed is unavailing. The conclusion that the evidence was insufficient in the present case was mandated by *pre-Reed* law. Moreover, in *Piper*, *Jackson*, and *Williams*, *supra*, for example, there was insufficient evidence to support a Penal Code section 667, subdivision (a) enhancement. In each case, imposition of sentence on the enhancement was effectively barred, and no remand for retrial on the enhancement allegation occurred. (*People* v. *Piper*, *supra*, 42 Cal.3d at pp. 475-478; *People* v. *Jackson*, *supra*, 7 Cal.App.4th at pp. 1370-1373; *People* v. *Williams*, *supra*, 222 Cal.App.3d at pp. 914-918.)

Respondent's reliance upon *In re Moser* (1993) 6 Cal.4th 342, and *People* v. *Goodner* (1992) 7 Cal.App.4th 1324, for a contrary conclusion is misplaced. Neither

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the sentencing comment omitted that, at the court trial, the court expressly referred to the taking of "judicial notice." In any event, the court file was used at the court trial only to prove the fact of the prior "conviction."

any) of relitigating the prior conviction allegation].) More importantly, double jeopardy does not apply to noncapital sentencing.

A. *People v. Equarte* (1986) 42 Cal.3d 456

As a preliminary matter, respondent asks this Court to decide whether *People* v. *Equarte* (1986) 42 Cal.3d 456, (as the Court of Appeal believed) requires respondent to prove appellant personally inflicted great bodily injury within the meaning of subdivision (c)(8) of section 1192.7 and/or personally used a dangerous or deadly weapon within the meaning of subdivision (c)(23) of section 1192.7 as to appellant's prior assault. If *Equarte* does not require such proof, this Court need only remand this case with instructions to affirm the judgment of conviction and sentence.

In *Equarte*, the defendant was charged with two counts of assault with a deadly weapon, and it was further alleged (in relevant part) he suffered a prior "serious felony" within the meaning of sections 667 and 1192.7, subdivision (c)(25) (a 1981 attempted robbery conviction). (*People v. Equarte, supra,* 42 Cal.3d at p. 459.) The complaint did not allege that the defendant's current substantive offenses (the two assault counts) were "serious felonies" within the meaning of sections 667 and 1192.7, subdivision (c), and it contained no allegation that the defendant had "personally used a dangerous or deadly weapon" as to the *current* assault counts. (*Ibid.*) A jury found defendant guilty of one assault count, and following a sentencing hearing (pursuant to which the defendant conceded his prior attempted robbery was a serious felony), the court enhanced defendant's sentence by five years pursuant to subdivision (a) of section 667. (*Id.*, at p. 460.) At sentencing, defendant argued the prosecution had neither pled nor

proved his current assault was a "serious felony" for purposes of subdivision (a) of section 667. (*Ibid.*) The sentencing court noted the prosecution had not specifically pled, nor had the jury specifically found, that defendant *personally* used a dangerous or deadly weapon. However, that court apparently concluded "no such pleading was required" and defendant's "personal use" for purposes of section 667 was adequately established since the evidence at trial clearly established there had been no accomplice as to the assault. (*Ibid.*) The Court of Appeal affirmed the assault conviction but reversed the five-year section 667 enhancement. (*Ibid.*)

This Court reversed the Court of Appeal insofar as it invalidated the section 667 enhancement. (*People v. Equarte, supra*, 42 Cal.3d at p. 467.) In the process of doing so, *Equarte* held: "[A]n assault-with-a-deadly-weapon conviction may constitute a 'serious felony' within the relevant statutes [section 667, subdivision (a), and section 1197.2, subdivision (c)] if the prosecution properly established that the defendant 'personally used a dangerous or deadly weapon' in the commission of the offense (§ 1192.7, subd. (c)(23))." (*Id.*, at pp. 459, 465.)

This case is factually distinguishable from *Equarte* for the simple reason that the assault issue there related to the underlying offense, and the "serious felony" determination related to subdivision (a) of section 667. Here, the assault issue relates to a prior felony conviction allegation, and the "serious felony" determination relates to subdivisions (b) through (i) of section 667. The Court of Appeal here obviously believed this is a distinction without a difference. Respondent disagrees.

Subdivision (a) of section 667 is an enhancement scheme. (See *People v. Martin* (1995) 32 Cal.App.4th 656, 666 ["An 'enhancement' is 'an additional term of imprisonment added to the base term"], citing Cal. Rules of Court, rule 405(c).) By contrast, subdivisions (b) through (i) of section 667 (the Three Strikes Law) has been held not to be an enhancement at all. (*People v. Martin, supra,* 32 Cal.App.4th at pp. 666-668.) Rather, the Three Strikes Law "defines the term for the [current underlying] crime itself, supplanting the term that would apply but for the prior serious or violent felony." (*Id.*, at p. 667.) The Three Strikes Law applies to a defendant with a prior *serious and/or violent* felony who commits any new *felony*. (Pen. Code, § 667, subds. (b), (d)(1) and (e).)[3] By contrast, subdivision (a) of section 667 applies to a defendant with a prior *serious* felony who commits a new *serious* felony. (Pen. Code, § 667, subds. (a)(1); *People v. Reed, supra,* 13 Cal.4th at p. 222.) Finally, trial judges have no discretion to dismiss or strike an enhancement under subdivision (a) of section 667. (Pen. Code, § 1385, subd (b).) By contrast, this Court has decided trial judges retain discretion to dismiss or strike priors found true under the Three Strikes Law. (*People* v. *Superior Court (Romero)* (1996) 13 Cal.4th 497.) Thus, subdivision (a) of section 667 and subdivisions (b) through (i) of section 667 are entirely different schemes, serve completely different objectives, and result in different forms of punishment in that trial judges retain discretion to dismiss or strike priors found true under the Three Strikes

3. The purpose of the Three Strikes Law is stated expressly in the law: "It is the intent of the Legislature in enacting subdivisions (b) to (i), inclusive, to ensure longer prison sentences and greater punishment for those who commit a felony and have been previously convicted of serious and/or violent felony offenses." (Pen. Code, § 667, subd. (b).)

Law but have no discretion to dismiss or strike an enhancement under subdivision (a) of section 667.

In light of the foregoing, why should the circumstances here be governed by *Equarte*? That case stands for the proposition that if the prosecution seeks a five-year section 667 enhancement in a case where the defendant is charged with the crime of assault with a deadly weapon, the prosecution must prove the defendant "personally used a dangerous or deadly weapon" during the commission of the assault. (See *People v. Equarte, supra,* 42 Cal.3d at p. 464.) Nothing in *Equarte* (or *People v. Reed, supra,* 13 Cal.4th 217) expressly requires that in order to impose a *Three Strikes* sentence, the prosecution must prove "personal use" as to the defendant's prior assault.

Admittedly, the common denominator between subdivision (a) of section 667 and subdivisions (b) through (i) of section 667 is that both statutes require reference to subdivision (c) of section 1192.7 in order to find a prior conviction a "serious felony." (Pen. Code, § 667, subds. (a)(4), (d)(1).) Further, subdivision (c) of section 1192.7 does not include "simple" assault with a deadly weapon among the specifically listed offenses included in its numerous categories. *Equarte* notes this fact. (*People v. Equarte, supra,* 42 Cal.3d at pp. 462, 466.)

However, given that judges retain discretion to dismiss a true "strike" finding (*Romero*), but have no discretion to dismiss a true finding under subdivision (a) of section 667 (Pen. Code, § 1385, subd. (b)), it would be entirely fair if this Court refused to extend *Equarte* to Three Strikes cases. If there is any question that a Three Strikes candidate personally inflicted great bodily injury and/or personally used a dangerous or deadly weapon as to a prior assault with a deadly weapon, the trial court could easily exercise its discretion under

Romero. The same luxury is not afforded under section 667, subdivision (a). Thus, it makes sense to force the prosecution to prove "personal use" for purposes of subdivision (a) of section 667, but not for purposes of Three Strikes sentencing.

B. Double Jeopardy

Respondent submits the decision of the Court of Appeal should be reversed for any (or all) of the following reasons.

1. Double Jeopardy Does Not Apply To Noncapital Sentencing

This Court is obviously free to decide this case on any ground it sees fit. However, respondent urges this Court to hold double jeopardy does not apply to noncapital sentencing, as have courts in New York[4] and Indiana.[5]

In *Caspari*, the federal high court noted the holdings in New York and Indiana and noted the contrary rule adopted elsewhere.[6] (*Caspari v. Bohlen, supra,* 510 U.S. at p. 394.) Writing for the *Caspari* majority (which included Chief Justice Rehnquist and Justices

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4. *People v. Sailor* (1985) 491 N.Y.S.2d 112, 118-121 [65 N.Y.2d 224, 231-236] [held Fifth Amendment Double Jeopardy Clause does not apply to sentencing under state habitual offender statutes].

5. *Durham v. State* (Ind. 1984) 464 N.E.2d 321, 323-325 [held double jeopardy principles do not bar relitigating habitual offender charge (two prior felony conviction allegations) after earlier jury found charge not true].

6. See e.g., *Cooper v. State* (Tex. Crim.App. 1982) 631 S.W.2d 508, 513-514); *State v. Hennings* (1983) 670 P.2d 256, 259-262 [100 Wash.2d 379, 386-390]; *Briggs v. Procunier* (5th Cir. 1985) 764 F.2d 368, 371.

Blackmun, Scalia, Kennedy, Souter, Thomas and Ginsburg), Justice O'Connor wrote:

> "While our cases may not have foreclosed the application of the Double Jeopardy Clause to noncapital sentencing, neither did any of them apply the Clause in that context. On the contrary *Goldhammer* [*Pennsylvania v. Goldhammer* (1985) 474 U.S. 28 (*per curiam*)] and *Strickland* [*Strickland v. Washington* (1984) 466 U.S. 668] strongly suggested that *Bullington* [*Bullington v. Missouri* (1981) 451 U.S. 430] was limited to capital sentencing. We therefore conclude that a reasonable jurist reviewing our precedents at the time of respondent's conviction and sentence became final would not have considered the application of the Double Jeopardy Clause to a noncapital sentencing proceeding to be dictated by our precedents." (*Caspari v. Bohlen, supra,* 510 U.S. at p. 393 (citation omitted).)

It is thus clear a majority of the current federal high court would in all probability hold double jeopardy does not apply to noncapital sentencing. Nevertheless, "[c]onstitutional law is not the exclusive province of the federal courts[.]" (*Caspari v. Bohlen, supra,* 510 U.S. at p. 395.) For this reason, respondent asks this Court hold double jeopardy does not apply to noncapital sentencing.

Respondent begins with a discussion of *Bullington v. Missouri* (1981) 451 U.S. 430 [68 L.Ed.2d 270, 101 S.Ct. 1852], and *Arizona v. Rumsey* (1984) 467 U.S. 203 [81 L.Ed.2d 164, 104 S.Ct. 2305], since those cases, both involving bifurcated death penalty proceedings, are the source of the tension here.[7]

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7. The opposition argument is this: The issue of whether double jeopardy applies to a sentencing proceeding (capital or otherwise) turns on the extent to which the sentencing proceeding resembles a trial. (See *People v. Sailor, supra,* 65 N.Y.S.2d at pp. 122-125 [dissenting opn.]; *Durham v. State, supra,* 464 N.E.2d at pp. 325-326 [dissenting opn.]; *State v. Hennings, supra,* 670 P.2d at pp. 257-258, 260, 261-262 [the issue is whether the sentencing proceeding has the "hallmarks" of a trial on guilt or innocence]; *Briggs v. Procunier, supra,* 764 F.2d at p. 371; *Duroski v. Lewis* (9th Cir. 1989) 882 F.2d 357, 359.) The United States Supreme Court has made it abundantly clear that the general rule is double jeopardy principles do *not* apply to sentencing proceedings. (See *Caspari v. Bohlen, supra,* 510 U.S. at p. 392 ["Respondent acknowledges our traditional refusal to extend the Double Jeopardy Clause to sentencing"]; see also *Bullington v. Missouri, supra,* 451 U.S. at p. 438; *United States v. DiFrancesco* (1980) 449 U.S. 117, 133, 137-138 [66 L.Ed.2d 328, 101 S.Ct. 426]; *North Carolina v. Pearce* (1969) 395 U.S. 711, 719-723 [23 L.Ed.2d 656, 89 S.Ct. 2072].) *Bullington* (and later *Rumsey*) represent an exception to the general rule in the case of *capital* sentencing. (*Caspari v. Bohlen, supra,* 510 U.S. at p. 392 ["Both *Bullington* and *Rumsey* were capital cases, and our reasoning in those cases was based largely on the unique circumstances of a capital sentencing procedure"].) Thus, respondent submits extending *Bullington* to noncapital sentencing proceedings such as the instant would (in effect) swallow the general rule. This is precisely what Justice O'Connor noted while writing for the majority in *Caspari*. (*Id.*, at p. 393.)

The issue in *Bullington* was whether (following the grant of defendant's motion for a new trial) double jeopardy barred Missouri from seeking the death penalty at retrial after *a jury* had sentenced the defendant to life imprisonment without the possibility of parole for 50 years following the penalty phase of the first trial. (*Bullington v. Missouri, supra,*, 451 U.S. at pp. 432, 434, fn. 5, 437, fn. 8.)[8] The *Bullington* majority began by observing: "It is well established that the Double Jeopardy Clause forbids the retrial of a defendant who has

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8. Defendant Bullington was charged under Missouri law with "capital murder and other crimes arising out of the abduction of a young woman and her subsequent death by drowning." (*Bullington v. Missouri, supra,*, 451 U.S. at p. 435 [footnote omitted].)

been *acquitted* of the crime charged." (*Id.*, at p. 437 [italics in original; citations omitted].) The court then noted it has "resisted attempts to extend that principle to sentencing" because "[t]he imposition of a particular sentence usually is not regarded as an 'acquittal' of any more severe sentence that could have been imposed." (*Id.*, at p. 438.)

The *Bullington* majority found, however, the sentencing procedures required under the Missouri death penalty statute "differ[ed] significantly from those employed in any of the Court's cases where the Double Jeopardy Clause ha[d] been held inapplicable to sentencing." (*Bullington v. Missouri, supra,*, 451 U.S. at p. 438.) First, the "unbounded discretion" that normally applied to sentencing decisions was replaced by only two alternatives under the Missouri death penalty statute, death or life imprisonment without the possibility of parole for 50 years. (*Ibid.*) Second, the Missouri death penalty statute provided specific substantive standards to guide the jury's choice of the appropriate punishment in the form of 10 aggravating and 7 mitigating circumstances. (*Id.*, at pp. 434, 438.) Finally, the Missouri death penalty statute provided certain procedural safeguards, the most significant being that the prosecution carried the burden of proving "beyond a reasonable doubt" the existence of at least one aggravating circumstances not outweighed by mitigating circumstances. (*Id.*, at pp. 432-435, 438; see *Arizona v. Rumsey, supra,* 467 U.S. at p. 209 [discussing *Bullington*].)

The *Bullington* majority concluded the presentence hearing as to Bullington "resembled and, indeed, in all relevant respects was like the immediately preceding trial on the issue of guilt or innocence. It was like a trial on the issue of punishment[.]" (*Bullington v. Missouri, supra,* 451 U.S. at p. 438.) "In contrast, the sentencing procedures

considered in the Court's previous cases did not have the hallmarks of the trial on guilt or innocence." (*Id.*, at p. 439.) Following a discussion of other cases, the *Bullington* majority held double jeopardy barred Missouri from seeking the death penalty at retrial because the sentencing proceeding at Bullington's first trial was "like the trial on the question of guilt or innocence[.]" (*Bullington*, 451 U.S. at p. 446.)[9/]

Other than the fact that (in our state) a truthfulness proceeding *may* involve a (bifurcated) hearing before a jury[10/] in

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9. Similarly, the majority of the court in *Rumsey* held, pursuant to *Bullington*, double jeopardy barred Arizona from sentencing the defendant to death after his original sentence of life imprisonment without the possibility of parole for 25 years (set by a judge without the assistance of a jury) was set aside by the state high court. (*Arizona v. Rumsey, supra,* 467 U.S. at pp. 205-206, 209.) The *Rumsey* majority reasoned: "The capital sentencing proceeding in Arizona shares the characteristics of the Missouri proceeding that make it resemble a trial for purposes of the Double Jeopardy Clause. The sentencer--the trial judge in Arizona--is required to choose between two options: death, and life imprisonment without the possibility of parole for 25 years. The sentencer must make the decision guided by detailed statutory standards defining aggravating and mitigating circumstances; in particular, death may not be imposed unless at least one aggravating circumstance is found, whereas death must be imposed if there is one aggravating circumstance and no mitigating circumstance sufficiently substantial to call for leniency. The sentencer must make findings with respect to each of the statutory aggravating and mitigating circumstances, and the sentencing hearing involves the submission of evidence and the presentation of argument. The usual rules of evidence govern the admission of evidence of aggravating circumstances, and the State must prove the existence of aggravating circumstances beyond a reasonable doubt. [Citation.] As the Supreme Court of Arizona held, these characteristics make the Arizona capital sentencing proceeding indistinguishable for double jeopardy purposes from the capital sentencing proceeding in Missouri [at issue in *Bullington*]." (*Arizona v. Rumsey, supra,* 467 U.S. at pp. 209-210 [citation omitted].)

10. Respondent notes the state or federal Constitutions do not

which respondent carries the burden of proving beyond a reasonable doubt the prior felony conviction allegation is true,[11/] a truthfulness proceeding is distinguishable from a capital sentencing proceeding in the following ways.

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require jury determinations as to the truthfulness of a prior felony conviction allegation. Indeed, this Court has already held a California criminal defendant has a limited *statutory* right to a bifurcated jury trial to determine the truthfulness of such an allegation, and, in fact, such a defendant has no absolute right to bifurcation. (See *People v. Wiley, supra,* 9 Cal.4th at pp. 585-586; *People v. Calderon* (1994) 9 Cal.4th 69, 76-78.)

11. Although this Court has labeled the prosecution's burden of proving a prior conviction allegation true beyond a reasonable doubt a "cardinal principle of criminal jurisprudence" under the Due Process Clause (*People v. Tenner* (1993) 6 Cal.4th 559, 566), that notion is without federal or even state constitutional support. Indeed, the federal Constitution allows for the determination of a sentencing-type proceeding to be proved by a preponderance of the evidence, not proof beyond a reasonable double. (*McMillan v. Pennsylvania* (1986) 477 U.S. 79, 84-93 [91 L.Ed.2d 67, 106 S.Ct. 2411, 2415-2419]; *Patterson v. New York* (1977) 432 U.S. 197, 201-202, 207, 210, 211, fn. 12, 214 [53 L.Ed.2d 281, 97 S.Ct. 2319]; see also *Garrett v. United States* (1985) 471 U.S. 773, 782 [85 L.Ed.2d 764, 105 S.Ct. 2407] ["the determination that a defendant is a dangerous special drug offender [under the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. § 848] is made on a preponderance of the information by the court"]; *People v. Sailor, supra,* 491 N.Y.S.2d at p. 120 ["In a persistent felony offender hearing, for example, the prosecution need only prove by a preponderance of the evidence that a defendant's history and character and the nature and circumstances of his criminal conduct warrant persistent felon treatment"]; but see *People v. Tenner, supra,* 6 Cal.4th at p. 566; *People v. Morton, supra,* 41 Cal.2d at p. 539.) Respondent submits there is no federal or state constitutional support for the notion that the proof of the truth of a prior felony conviction allegation must be beyond a reasonable doubt as a matter of federal or state constitutional law. Respondent notes this issue was thoroughly briefed in the reply brief filed by the People in *People v. Hernandez* (S047306), currently pending on review in this Court.

First, the adjudicator of a prior felony conviction allegation only has two options to choose from (true, or not true). Such an adjudicator is not being asked to decide whether the accused should be put to death, or sentenced to life imprisonment without the possibility of parole for a determinate (or indeterminate) number of years.

Second, the adjudicator of a prior felony conviction allegation is not guided by detailed statutory standards defining aggravating and mitigating circumstances, as is the case concerning capital sentencing. Rather, such an adjudicator is only being asked to decide whether the defendant is a recidivist as defined by the applicable recidivist statute.

Third, the adjudicator of a prior felony conviction allegation is concerned solely with the defendant's prior criminal record. By contrast, capital sentencing necessarily involves aggravating and/or mitigating factors so closely related to the commission of the underlying murder that the *punishment* ultimately imposed is essentially part of the substantive crime. (See *People v. Superior Court (Marks), supra,* 1 Cal.4th at p. 78, fn. 22.)

Fourth, *Bullington* turned, in part, on the following reasoning:

> "The 'embarrassment, expense and ordeal' and the 'anxiety and insecurity' faced by a defendant at the penalty phase of a Missouri capital murder trial surely are at least equivalent to that faced by any defendant at the guilty phase of a criminal trial. The 'unacceptably high risk that the [prosecution], with its superior resources, would wear down a defendant,' [citation], thereby leading to an erroneously imposed death sentence, would exist if the State were to have a further opportunity to convince a jury to impose the ultimate

punishment." (*Bullington v. Missouri, supra,* 451 U.S. at 445-446.)

The same cannot be said for a defendant facing a truthfulness finding of recidivism, especially considering the fact that unless removed (e.g., successfully collaterally attacked), the prior felony conviction will remain on the defendant's criminal resume and may be used (where applicable) as often as the defendant chooses to commit new crimes. In any event, any embarrassment, anxiety, or insecurity a first-time defendant may feel at the guilt phase of a criminal trial, is diminished in the case of a habitual offender facing noncapital sentencing because the recidivist by definition is well-acquainted with the criminal justice system (either in California or some other jurisdiction).

Fifth, the distinction between death penalties and noncapital sentencing is reasonable because death as a punishment is tied exclusively to commission of an underlying murder, while recidivism as a punishment depends on prior felony convictions, which, together with one more felony conviction results in an increased sentence (e.g., the Three Strikes Law). In short, the death penalty is crime specific, while determinations of repeat offender status are generic to all felonies. (See *People v. Sailor, supra,* 491 N.Y.S.2d at p. 119.) Indeed, a recidivist statute does not establish a separate offense. Rather, recidivist statutes (such the Three Strikes Law) provide for the imposition of a more severe sentence for the substantive crime charged because the defendant suffered qualifying prior convictions. The purpose of such laws (unlike the death penalty) is to more severely penalize those persons whom prior sanctions have failed to deter from committing felonies. (See *People v. Jackson* (1985) 37 Cal.3d 826, 833, citing *In re Foss* (1974) 10 Cal.3d 910, 922; *In re Rosencrantz* (1928) 205 Cal. 534,

538 [upheld against cruel or unusual punishment attack term of life without the possibility of parole for fraudulent uttering a check without sufficient funds after three prior felony convictions]; *Rummel v. Estelle* (1980) 445 U.S. 263, 284-285 [63 L.Ed.2d 382, 100 S.Ct. 1133]; *Durham v. State, supra,* 464 N.E.2d at pp. 323-324.)

Sixth, practical considerations also warrant holding double jeopardy does not apply to noncapital sentencing. Arguably, but in no way conceded by respondent, extension of the double jeopardy clause to truthfulness proceedings would seemingly mean that a failure to prove a defendant's prior felony conviction for any reason, even prosecutorial mistake or carelessness, unrelated to the truth of such prior convictions, would forever bar the use of that prior conviction in any subsequent sentencing proceeding. (See *People v. Sailor, supra,* 491 N.Y.S.2d at p. 121; but see *Cooper v. State, supra,* 631 S.W.2d at p. 514.)

The above factors are the primary reasons why New York (*People v. Sailor, supra,* 491 N.Y.S.2d at pp. 118-121 (4-to-2 decision)) and Indiana (*Durham v. State, supra,* 464 N.E.2d at pp. 323-325 (3-to-2 decision)) decided double jeopardy does not bar relitigating an habitual offender charge as to their recidivist schemes.

Finally, as noted earlier, the state or federal Constitutions do not require jury determinations as to the truthfulness of a prior felony conviction allegation. A California criminal defendant has a limited *statutory* right to a bifurcated jury trial to determine the truthfulness of such an allegation, and, in fact, such a defendant has no absolute right to bifurcation. (See *People v. Wiley, supra,* 9 Cal.4th at pp. 585-586; *People v. Calderon, supra,* 9 Cal.4th at pp. 76-78.) "The absence of any federal constitutional requirement that a jury determine the truth of prior conviction allegations is reflected in the circumstance that most

jurisdictions in the United States do not grant the defendant a right to a jury determination of such sentencing issues." (*People v. Wiley, supra,* 9 Cal.4th at p. 585; see *People v. Calderon, supra,* 9 Cal.4th at p. 76.) "Of those states, like California, that allow the jury to determine the truth of prior convictions alleged for purposes of sentence enhancement, at least 16 provide by statute for bifurcation of the proceedings relating to the truth of the alleged prior conviction." (*People v. Calderon, supra,* 9 Cal.4th at pp. 76-77 [footnote omitted].)

Given the fact that (1) a California criminal defendant has no state or federal *constitutional* right to a jury determination (bifurcated or otherwise) as to the truthfulness of a prior felony conviction allegation, (2) in such a proceeding the trier of fact is not being asked to decide whether the defendant should be put to death or sentenced to a life term, (3) the trier of fact is only being asked to decide whether a prior felony conviction allegation is true or not true, (4) a prior felony conviction allegation is not so closely related to the commission of the underlying crime that the punishment ultimately imposed is essentially part of the substantive crime, (5) any embarrassment, anxiety, or insecurity a first-time defendant may feel at the guilt phase of a criminal trial is diminished in the case of a habitual offender facing noncapital sentencing, (6) a prior felony conviction allegation does not create a separate "offense" (see discussion below), and (7) practical considerations warrant holding double jeopardy does not apply to noncapital sentencing because extension of double jeopardy to noncapital sentencing proceedings would seemingly mean that a failure to prove a defendant's prior felony conviction for any reason would forever bar the use of that prior conviction in any subsequent sentencing proceeding, respondent urges this Court to join New York

and Indiana in holding double jeopardy does not apply to noncapital sentencing.

2. A "Strike" Allegation Is Not An "Offense" Within The Meaning Of Double Jeopardy

Murder, of course, is a "substantive offense." (*People v. Santamaria* (1994) 8 Cal.4th 903, 917-918.) However, a knife use allegation pled with a murder offense does not create a separate offense. Rather, the knife use allegation is "merely a sentence enhancing allegation attached to the murder charge." (*Id.*, at p. 918.) Similarly, a "Three Strikes" allegation (or any other type of prior felony conviction allegation) pled with a substantive offense does not create a separate offense. Rather, the "strike" allegation is merely a sentencing enhancing allegation attached to the underlying substantive offense. In *People v. Martin, supra,* 32 Cal.App.4th at pp. 666-668, the appellate court held the sentencing provision of the legislative version of the Three Strikes Law (§§ 667, subd. (e); see 1170.12, subd. (c) [voter's initiative version]) is *not* an enhancement. Respondent agrees,[12/] and adds it is also not an "offense" within the meaning of

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12. However, even if this Court were to find sentencing under the Three Strikes Law constitutes an enhancement, respondent submits that determination would not mean that a "strike" allegation creates a separate "offense" for purposes of double jeopardy. In *People v. Wims* (1995) 10 Cal.4th 293, this Court distinguished statutes that articulate a penalty provision from those that create a substantive crime or offense. (*Id.*, at p. 305 ["section 12022(b) articulates a *penalty provision*, not a substantive crime"] [italics in original], citing among other cases *People v. Hernandez* (1988) 46 Cal.3d 194, 207-208.) "California courts have long recognized that '[a]n enhancement is not a separate crime or offense . . . .'" (*People v. Wims, supra,* 10 Cal.4th at p. 304 (citations omitted).) "Enhancements typically focus on an element of the

double jeopardy. (See *North Carolina v. Pearce, supra,* 395 U.S. at p. 717 [the double jeopardy guarantee consists of three separate constitutional protections: it protects against a second prosecution for the same offense after acquittal, it protects against a second prosecution for the same offense after conviction, and it protects against multiple punishments for the same offense]; *People v. Morton, supra,* 41 Cal.2d at p. 543 ["Proof of prior convictions or the adjudication that the defendant is an habitual criminal does not involve substantive offenses, but merely provides for increased punishment of those whose prior convictions fall within the scope of these statutes"].)

Both this Court and the federal high court have long held that recidivist sentencing provisions (such as subdivision (e) of section 667 and subdivision (c) of section 1170.12) do not create substantive offenses. Rather, such laws provide for the imposition of a more severe sentence for the substantive offense charged because the defendant suffered qualifying prior convictions. (See *People v. Jackson, supra,* 37 Cal.3d at p. 833 ["In the context of habitual criminal statutes, 'increased penalties for subsequent offenses are attributable to the defendant's status as a repeat offender and arise as an incident of the subsequent

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commission of the crime or the criminal history of the defendant which is not present for all such crimes and perpetrators and which justifies a higher penalty than that prescribed for the offenses themselves." (*People v. Hernandez, supra,* 46 Cal.3d at pp. 207-208 [held section 667.8 (kidnapping for purposes of rape or other sexual offense whereupon a three year additional term may be imposed) is not a substantive offense]; *People v. Wims, supra,* 10 Cal.4th at p. 304.) The *Wims* court stated: "That an enhancement resembles a substantive offense, insofar as it imposes additional punishment based upon a factual finding that a defendant engaged in particular conduct, may be true. Such similarity, however, does not elevate to federal constitutional stature defendants' section 12022(b) jury rights." (*People v. Wims, supra,* 10 Cal.4th at p. 304.)

offense rather than a penalty for the prior offense'"]; *In re Rosencrantz, supra,* 205 Cal. at p. 538 ["'. . . The true ground upon which these statutes are sustained is, that the punishment is awarded for the second offense only, and that in determining the amount or nature of the penalty to be inflicted, the legislature may require the courts to take into consideration the persistence of the defendant in his criminal course'"] [citation omitted]; *Nichols v. United States* (1994) 511 U.S. 738, __ [128 L.Ed.2d 745, 114 S.Ct. 1921, 1927] ["Enhancement statutes, whether in the nature of criminal history provisions such as those contained in the Sentencing Guidelines, or recidivist statutes which are common place in state criminal laws, do not change the penalty imposed for the earlier conviction"]; *Rummel v. Estelle, supra,* 445 U.S. at pp. 284-285.) Clearly, there can be no double jeopardy violation based on relitigating the truthfulness of a prior felony conviction allegation when such an allegation does not create a substantive offense. (See *People v. Morton, supra,* 41 Cal.2d at p. 543.)

In any event, in *People v. Visciotti* (1992) 2 Cal.4th 1, this Court affirmed a death verdict in which the defendant claimed it was a violation of double jeopardy to introduce evidence of his past criminal conduct in the penalty phase. Writing for the majority (which included Chief Justice George and Justice Kennard), Justice Baxter wrote in *Visciotti*: "The presentation of evidence of past criminal conduct at a sentencing hearing does not place the defendant in jeopardy with respect to the past offenses. He is not on trial for the past offense, is not subject to conviction or punishment for the past offense, and may not claim either speedy trial or double jeopardy protection against introduction of such evidence." (*Id.*, at p. 71, citing *People v. Melton* (1988) 44 Cal.3d 713, 756, fn. 17 ["We conclude, however, that one is

not placed 'twice in jeopardy for the same offense' when the details of misconduct which has already resulted in conviction and punishment, or in dismissal pursuant to a plea bargain or for witness unavailability, are presented in a later proceeding on the separate issue of the appropriate penalty for a *subsequent* offense. [Citation.] Such a procedure is proper, in our view, even if the defendant must thereby endure the 'ordeal' of a second 'trial'"] [citation omitted; italics in original], and noting the Court rejected "similar claims" in *People v. Karis* (1988) 46 Cal.3d 612, 640, and *People v. Gates* (1987) 43 Cal.3d 1168, 1203; see also *People v. Wharton* (1991) 53 Cal.3d 522, 601-602 ["Defendant claims the People were permitted to relitigate his 1975 crimes in violation of the constitutional proscription against placing a criminal defendant twice in jeopardy. [Citations.] We have previously rejected this claim [citations], and defendant does not present persuasive reasons why we should reconsider those decisions"] [footnote omitted]; *People v. McDowell* (1988) 46 Cal.3d 551, 568 ["we reject defendant's claim that the introduction of evidence of his prior offense constituted double jeopardy. Defendant was not placed twice in jeopardy for the same offense; rather, evidence of the offense was admitted to assist the jury in its determination of the appropriate sentence"].)

It would be anomalous if this Court were to hold double jeopardy does *not* apply to the introduction of evidence of the defendant's prior felony convictions in a capital sentencing proceeding, but *applies* in a noncapital sentencing proceeding. This would be bizarre (if for no other reason) because a prior felony conviction allegation does not create a separate "offense."[13] (See *Garrett v.*

13. The Double Jeopardy Clause of the Fifth Amendment

United States, supra, 471 U.S. at p. 782 ["the very next section of the statute entitled 'Dangerous Special Drug Offender Sentencing' is a recidivist provision. It is drafted in starkly contrasting language which plainly is not intended to create a separate offense"]; see e.g., *People v. Saunders, supra,* 5 Cal.4th at p. 593.)

Indeed, *Garrett v. United States, supra,* 471 U.S. 773, is instructive. There, the federal high court was asked to "examine the double jeopardy implications of a prosecution for engaging in a 'continuing criminal enterprise' (CCE), in violation of the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. § 848, when facts underlying a prior conviction are offered to prove one of three predicate offenses that must be shown to make a CCE violation." (*Id.*, at p. 775.) The petitioner urged double jeopardy barred a CCE prosecution. (*Ibid.*) The majority disagreed. (*Id.*, at p. 795 ["We think here logic supports the conclusion, also indicated by the legislative history, that Congress intended separate punishments for the underlying substantive predicates and for the CCE offense. Congress may, of course, so provide if it wishes"].

The *Garrett* majority arrived at its result as follows: First, it addressed petitioner's claim that CCE "is a separate substantive offense[.]" (*Garrett v. United States, supra,* 471 U.S. at p. 777.) After discussing the legislative history and language set forth in the applicable statute, the majority concluded Congress intended CCE to be a "separate offense[.]" (*Id.*, at pp. 778-786.) Next, the majority turned to

provides "nor shall any person be subjected for the same *offence* to be twice put in jeopardy of life or limb[.]" (Emphasis added.) The parallel provision in the California Constitution, embodied in article I, section 15 of the California Constitution, provides "[p]ersons may not twice be put in jeopardy for the same *offense*." (Emphasis added.)

the issue of what effect (if any) double jeopardy principles had on its conclusion that CCE is a separate offense. (*Id.*, at p. 786 ["The critical inquiry is whether a CCE offense is considered the 'same offense' as one or more of its predicate offenses within the meaning of the Double Jeopardy Clause"].) The majority answered that question in the negative. (*Id.*, at p. 786 ["Quite obviously the CCE offense is not, in any common-sense or literal meaning of the term, the 'same' offense as one of the predicate offenses"]; see *Id.*, at pp. 786-795.)

Thus, even if this Court were to find our Legislature (or the voters) intended the Three Strikes Law to be a separate offense, the federal Constitution would not require application of double jeopardy principles to such an "offense" as demonstrated in *Garrett v. United States, supra,* 471 U.S. 773. Further, as noted earlier, in the context of a truthfulness proceeding as to a prior conviction allegation, if the Double Jeopardy Clause of the federal Constitution is not implicated, neither is the parallel provision in the California Constitution. (See *People v. Saunders, supra,* 5 Cal.4th at p. 596.)

Based on the foregoing, respondent submits a prior felony conviction allegation is not an "offense" within the meaning of double jeopardy, and thus, double jeopardy does not bar relitigation here.

3. *People v. Morton* (1953) 41 Cal.2d 536

Morton held upon reversal of a prior conviction finding due to insufficient evidence, if the defect in proof is capable of correction on retrial, the appropriate remedy is a limited retrial on the prior conviction allegation. (*People v. Morton, supra,* 41 Cal.2d at pp. 542, 544-545.) Respondent has already shown that double jeopardy does not apply to noncapital sentencing, and, in any event, a prior felony

conviction allegation is not an "offense" within the meaning of double jeopardy. For these reasons, there was no need for the *Morton* court to assess the double jeopardy issue, and thus, *Morton* should govern here. (*Id.*, at pp. 544-545 [the remand remedy "carries out the policy of the statutes imposing 'more severe punishment, proportionate to their persistence in crime, of those who have proved immune to lesser punishment' [citation], and prevents defendants from escaping the penalties imposed by those statutes through technical defects in pleading or proof. It affords the defendant a fair hearing on the charge, and if it cannot be proved he will not have to suffer the more severe punishment"] [former (then) Justice Traynor writing for the majority]; see *People v. Saunders, supra,* 5 Cal.4th at p. 596 ["a procedure calling for the impanelling of a new jury to determine the truth of alleged prior convictions following the return of a guilty verdict in a bifurcated proceeding would not offend the double jeopardy clause"]; see also *People v. Latimer, supra,* 5 Cal.4th at p. 1213 [discussing stare decisis].) Under *Morton*, this case should be remanded to the trial court for a redetermination of whether the prior felony conviction allegation was true or not true.

In any event, "[t]he evils against which the double jeopardy clause is directed [are] absent in the present situation." (See *People v. Saunders, supra,* 5 Cal.4th at p. 595; see also *People v. Valladoli, supra,* 13 Cal.4th at p. 609.) The double jeopardy "evils" are: (1) allowing the prosecution the forbidden "second crack" at supplying evidence it failed to produce in an earlier proceeding; (2) enhancing the risk that an innocent person would be convicted by taking the question of guilt to a series of persons or groups empowered to make binding determinations; and (3) unfairly subjecting the defendant to the

embarrassment, expense, and ordeal of a second trial. (*People v. Saunders, supra,* 5 Cal.4th at p. 594, citing *Swisher v. Brady* (1978) 438 U.S. 204, 215-216 [57 L.Ed.2d 705, 98 S.Ct. 2699] [internal quotations omitted].)

The first double jeopardy "evil" (allowing the prosecution the forbidden "second crack" at supplying evidence it failed to produce in an earlier proceeding) is of no concern here because the jury found the "strike" allegation true. It was the Court of Appeal which concluded respondent should have proved appellant personally inflicted great bodily injury within the meaning of subdivision (c)(8) of section 1192.7 and/or personally used a dangerous or deadly weapon within the meaning of subdivision (c)(23) of section 1192.7 as to appellant's assault. Respondent did not know (and this Court is being asked to decide here) whether respondent had to prove the foregoing. Indeed, the Court of Appeal raised the instant issue on its own motion, pursuant to which the parties filed supplemental letter briefs. Under these circumstances, it would be an "evil" to bar respondent from relitigating the truthfulness of appellant's 1992 assault conviction.

The second double jeopardy "evil" (enhancing the risk that an innocent person would be convicted by taking the question of guilt to a series of persons or groups empowered to make binding determinations) is of no concern here because relitigation would involve the simple act of proving the truthfulness of whether the defendant suffered a prior felony conviction based on the record of the proceeding concerning the prior felony conviction. (See *People v. Guerrero* (1988) 44 Cal.3d 343, 355 ["in determining the truth of a prior-conviction allegation, the trier of fact may look to the entire record of the conviction"] ["To allow the trier to look to the record of the

conviction--*but no further*--is also fair: it effectively bars the prosecution from relitigating the circumstances of a crime committed years ago and thereby threatening the defendant with harm akin to double jeopardy . . ."] [italics in original]; *People v. Myers* (1993) 5 Cal.4th 1193, 1201; see also *People v. Morton, supra,* 41 Cal.2d at pp. 538-540.) This can easily be tried to the court, or to a new jury. (See *People v. Saunders, supra,* 5 Cal.4th at p. 596.) Indeed, writing for the majority (which included Chief Justice George, Justice Kennard and Justice Baxter), Justice Werdegar stated in *Valladoli*:

> "Thus, '[t]he evils against which the double jeopardy clause is directed were absent in the present situation.' (*People v. Saunders, supra,* 5 Cal.4th at p. 595.) Indeed, it would not necessarily violate the state or federal constitutional provisions against double jeopardy for the state to prescribe a *new jury* be impanelled to try any felony conviction allegations. (*Id.*, at pp. 595-596.) That being the case, to permit an amended filing and have *the same jury* determine the truth of the prior felony conviction allegations cannot violate double jeopardy." (*People v. Valladoli, supra,* 13 Cal.4th at p. 609 [italics in original].)

There would be no logical reason for allowing a truthfulness proceeding where the prior felony conviction is alleged *after* the jury reaches its verdict on a substantive offense (*Valladoli*), but disallowing relitigation where an appellate court reverses a true finding on insufficiency grounds (the instant case). The same "evil" is *absent* under both scenarios.

The third double jeopardy "evil" (unfairly subjecting the defendant to the embarrassment, expense, and ordeal of a second trial) is of no concern here because a habitual offender (by definition) is

well-acquainted with the criminal justice system. If the recidivist is "embarrassed" or worried about the "expense," he or she can always request a court trial and/or appointment of counsel. In any event, it is clear the recidivist would suffer no "ordeal" since such a proceeding arguably involves nothing more than a hearing based on the record of the proceeding from the prior felony conviction.

Further, the decision in *Burks v. United States* (1978) 437 U.S. 1 [57 L.Ed.2d 1, 98 S.Ct. 2141], does not change the outcome here. There, the federal high court held double jeopardy bars the prosecution from subjecting an accused to a second trial when the conviction is reversed on appeal for insufficient evidence. *Burks* involved double jeopardy in the context of a substantive offense (bank robbery). The instant case involves double jeopardy in the context of a truthfulness proceeding involving a prior felony conviction. This fact makes the instant case distinguishable from *Burks*.

In any event, while it is true the instant Court of Appeal reversed the "strike" finding on insufficiency grounds, it did so, as discussed above, because in that court's opinion respondent should have proved appellant personally inflicted great bodily injury within the meaning of subdivision (c)(8) of section 1192.7 and/or personally used a dangerous or deadly weapon within the meaning of subdivision (c)(23) of section 1192.7 as to appellant's prior assault. This fact makes the instant case distinguishable from *Burks*, where the prosecution "failed to muster" sufficient evidence in the first proceeding to rebut Burks's insanity defense. (*Burks v. United States, supra,* 437 U.S. at pp. 2-3, 11; see *People v. Superior Court (Marks), supra,* 1 Cal.4th at p. 72.)

Indeed, "[i]t has long been settled . . . that the Double Jeopardy Clause's general prohibition against successive prosecutions

does not prevent the government from retrying a defendant who succeeds in getting his first conviction set aside, through direct or collateral attack, because of some error in the proceedings leading to conviction." (*Lockhart v. Nelson* (1988) 488 U.S. 33, 38 [102 L.Ed.2d 265, 109 S.Ct. 285] [citations omitted]; *Burks v. United States, supra,* 437 U.S. at p. 14; *People v. Santamaria, supra,* 8 Cal.4th at pp. 910-911.) Respondent submits there was an error in the proceedings leading to the true finding in this case if respondent was required to prove a fact no one believed was warranted. As noted above, the Court of Appeal raised the *Equarte* issue on its own motion. No party saw the issue at trial (or on appeal). As the high court noted in *Lockhart*: "*Burks* was careful to point out that a reversal based solely on evidentiary insufficiency had fundamental different implications, for double jeopardy purposes, than a reversal based on such ordinary 'trial errors' as the 'incorrect receipt or rejection of evidence.'" (*Lockhart v. Nelson, supra,* 488 U.S. at p. 40 [citation omitted].) "While the former is in effect a finding 'that the government has failed to prove its case' against the defendant, the latter 'implies nothing with respect to the guilt or innocence of the defendant,' but is simply 'a determination that [he] has been convicted through a judicial *process* which is defective in some fundamental respect.'" (*Id.*, at p. 273 [citation omitted; italics in original].)

The instant case is similar to the situation in *Lockhart v. Nelson, supra,* 488 U.S. 33, where the federal high court held double jeopardy did not bar retrial of a conviction reversed by a reviewing court because some evidence has been improperly admitted. *Lockhart* is the instant case in reverse. In *Lockhart*, the evidence was insufficient because a federal habeas proceeding later proved a prior conviction

used at trial had been pardoned. (*Lockhart, v. Nelson, supra,* 488 U.S. at p. 34 ["We conclude that in cases such as this, where the evidence offered by the State and admitted by the trial court--whether erroneously or not--would have been sufficient to sustain a guilty verdict, the Double Jeopardy Clause does not preclude retrial"].) Here, the evidence was purported insufficient because the Court of Appeal later held respondent should have proved a fact no trial (or appellate) party believed was necessary. In the words of the *Lockhart* majority, "this is a situation described in *Burks* as reversal for 'trial error[.]'" (*Id.*, at p. 40.)[14/] This is especially true given the fact that here, as in *Lockhart*, "[n]othing in the record suggests any misconduct in the prosecutor's submission of the evidence." (*Id.* at p. 34, 37, fn. 2.)

"The basis for the *Burks* exception to the general rule is that a reversal for insufficiency of the evidence should be treated no different than a trial court's granting a judgment of acquittal at the close of all the evidence." (*Lockhart v. Nelson, supra,* 488 U.S. at p. 41.) The same cannot be said when a reviewing court reverses a *true finding* because in its opinion the People failed to prove a fact no trial (or appellate) party believed was necessary. "Permitting retrial in this instance is not the sort of governmental oppression at which the Double Jeopardy Clause is aimed; rather, it serves the interest of the

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14. In any event, the federal high court has stated: "The exaltation of form over substance is to be avoided. The Court has said that in the double jeopardy context it is the substance of the action that is controlling, and not the label given that action." (*United States v. DiFrancesco, supra,* 449 U.S. at p. 144 [citations omitted]; *People v. Saunders, supra,* 5 Cal.4th at p. 593; see also *People v. Superior Court (Marks), supra,* 1 Cal.4th at p. 72 ["to gauge the import and application of double jeopardy principles in the present context, we must take careful measure of the precise terms and circumstances of the defendant's conviction"] [footnote omitted].)

defendant by affording him an opportunity to 'obtai[n] a fair readjudication of his guilt [or prior felony conviction] free from error.'" (*Id.*, at p. 42 [citations omitted]; *People v. Santamaria, supra,* 8 Cal.4th at p. 911.)

The instant case is also similar to the situation in *United States v. DiFrancesco, supra,* 449 U.S. 117. There, the defendant was convicted of being a "dangerous special offender" under a federal statute (the Organized Crime Control Act of 1970, 18 U.S.C. § 3576) wherein the district court sentenced defendant to two ten-year prison terms to be served concurrently with each other and with a nine-year sentence previously imposed on convictions at an unrelated federal trial. (*Id.*, at pp. 118-119, 122-123.) This sentence resulted in defendant being punished for only one year as to the "dangerous special offender" offense. (*Id.*, at pp. 122-123.) The statute allowed the federal prosecutors to appeal under the given circumstances, and they did. The circuit court dismissed the appeal on double jeopardy grounds. The high court reversed. (*Id.*, at pp. 119-121, 123, 138-139, 143.)

The *DiFrancesco* majority framed the ultimate issue as "whether the increase of a sentence on review . . . constitutes multiple punishment in violation of the Double Jeopardy Clause." (*United States v. DiFrancesco, supra,* 449 U.S. at p. 138.) Answering that question in the negative, the majority reasoned, in relevant part, "our task is to determine whether a criminal sentence, once pronounced, is to be accorded constitutional finality and conclusiveness similar to that which attaches to a jury's verdict of acquittal. We conclude that neither the history of sentencing practices, nor the pertinent rulings of this Court, nor even considerations of double jeopardy policy support such an equation." (*Id.*, at p. 132.) The *DiFrancesco* majority noted: "This

Court's decisions in the sentencing area clearly establish that a sentence does not have the qualities of constitutional finality that attend an acquittal." (*Id.*, at p. 134.) The *DiFrancesco* majority also noted: "The double jeopardy considerations that bar reprosecution after an acquittal do not prohibit review of a sentence." (*Id.*, at p. 136.) Finally, "[t]he Double Jeopardy Clause does not provide the defendant with the right to know at any specific moment in time what the exact limit of his punishment will turn out to be." (*Id.*, at p. 137; see e.g., *Bullington v. Missouri, supra,* 451 U.S. at pp. 441-442, fn. 15 ["The history of sentencing practices [discussed in *DiFrancesco*] is of little assistance to Missouri in this case, since the sentencing procedures for *capital* cases instituted after the decision in [*Furman v. Georgia* (1972) 408 U.S. 238] are *unique*"] [italics added].)

Based on the foregoing, it is abundantly clear the federal Double Jeopardy Clause does not bar relitigation of a prior felony conviction for purposes of noncapital sentencing. It is equally clear that in the context of a truthfulness proceeding as to a prior conviction allegation, if the Double Jeopardy Clause of the federal Constitution is not implicated, neither is the parallel provision in the California Constitution. (See *People v. Saunders, supra,* 5 Cal.4th at p. 596.) For these reasons, this Court's decision in *Morton* is sound, and governs here. (*People v. Morton, supra,* 41 Cal.2d at pp. 542, 544-545.) In any event, for the above reasons, relitigating the truthfulness of a prior felony conviction would not violate double jeopardy principles.

II.

PEOPLE V. REED (1996) 13 CAL.4TH 217, SHOULD APPLY TO CASES PENDING AT THE TIME IT WAS DECIDED

This Court noted in *Reed*: "In *Guerrero* [*People v. Guerrero, supra,* 44 Cal.3d 343] we declined to address any question regarding 'what items in the record of conviction are admissible and for what purpose.'" (*People v. Reed, supra,* 13 Cal.4th at p. 223 [citation and footnote omitted].) *Reed* required this Court "to resolve two such issues of admissibility." (*Ibid.*) Ultimately, *Reed* (decided after initial appellate briefing in this case) held excerpts from a preliminary hearing transcript are admissible under the former testimony exception (Evid. Code, § 1291) to the hearsay rule (Evid. Code, § 1200) to prove the substance of a prior conviction, but excerpts from a probation report are inadmissible hearsay and thus may not be used to prove the substance of a prior conviction. (*Id.*, at pp. 225-231.) As will appear, *Reed* should apply to this case if it is remanded for a truthfulness proceeding as to appellant's prior assault.

This Court stated in *Guerrero*: "We conclude that in determining the truth of a prior-conviction allegation, the trier of fact may look to the entire record of the conviction." (*People v. Guerrero, supra,* 44 Cal.4th at p. 345.) However, as *Reed* notes: "Neither *Guerrero* nor *People v. Myers, supra,* 5 Cal.4th 1193, contains a definition of 'record of conviction' or a discussion of what the term means in this context." (*People v. Reed, supra,* 13 Cal.4th at p. 223.) In *Reed*, the parties conceded a preliminary hearing transcript is included in the definition of "record of conviction." (*Ibid.*) No doubt the parties conceded the point because, as *Reed* notes, various appellate decisions

had reached that result. (*People v. Reed, supra,* 13 Cal.4th at p. 229; see *People v. Gonzales* (1994) 29 Cal.App.4th 1684, 1701-1704; *People v. Goodner* (1990) 226 Cal.App.3d 609, 614-616; *People v. Castellanos* (1990) 219 Cal.App.3d 1163, 1170-1174.)

It is readily apparent *Reed*'s holding (a preliminary hearing transcript is admissible to prove the truthfulness of a prior felony conviction allegation) was not a "new rule" subject to the general rule of prospective application only. (See *Teague v. Lane* (1989) 489 U.S. 288, 301 [103 L.Ed.2d 334, 109 S.Ct 1060] [plurality opn. by O'Connor, J] ["a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government"] ["To put it differently, a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final"] [citations omitted; italics in original]; see e.g., *People v. Scott* (1994) 9 Cal.4th 331, 356-358; *People v. Welch* (1993) 5 Cal.4th 228, 238; *People v. Collins* (1986) 42 Cal.3d 378, 388.) Indeed, *Reed* states, "we reach the same result as those courts [*Gonzales*, *Goodner* and *Castellanos*][.]" (*People v. Reed, supra,* 13 Cal.4th at p. 229.) Thus, there is no reason respondent should be barred from proving the truthfulness of appellant's prior assault conviction on remand with the preliminary hearing transcript from that proceeding. This is particularly true given the fact, as *Reed* notes, *Guerrero* "precluded the prosecution from calling live witnesses to the criminal acts in the prior case." (*Id.*, at p. 226.)

CONCLUSION

Accordingly, for the reasons stated, respondent respectfully asks that the decision of the Court of Appeal be reversed, and that this case be remanded to the trial court for relitigation of the "strike" allegation.

Dated: January 23, 1997.

Respectfully submitted,

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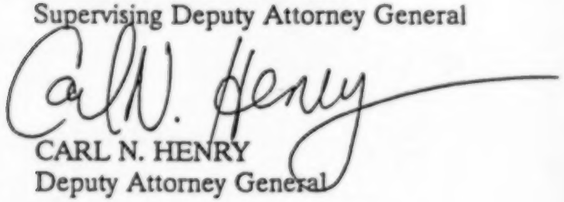

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DECLARATION OF SERVICE BY MAIL

Re: ***PEOPLE v. ANGEL JAIME MONGE; NO. S05581***

I, F. MITCHELL, declare that I am over 18 years of age, and not a party to the within cause; my business address is 300 South Spring Street, Los Angeles, California 90013; I served one copy of the attached

RESPONDENT'S BRIEF ON THE MERITS

on each of the following, by placing same in an envelope addressed as follows:

Gilbert Garcetti
Los Angeles District Attorney
Attn: Larry Larson
Deputy District Attorney
400 Civic Center Plaza, Suite 201
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Clifford Gardner
Attorney at Law
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Honorable John A. Clarke
County Clerk/Executive Officer
Los Angeles County Superior Court
111 North Hill Street
Los Angeles, CA 90012
FOR DELIVERY TO: Sam Cianchetti, Judge

I delivered/mailed a copy of the (**Respondent's Brief on the Merits**) to the Clerk of the Court of Appeal, Second Appellate District, Division Three, 300 South Spring Street, Los Angeles, CA 90013.

Each said envelope was then, on JAN 2 3 1997, sealed and deposited in the United States mail at Los Angeles, California, the county in which I am employed, with the postage thereon fully prepaid.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on JAN 2 3 1997, at Los Angeles, California.

Declarant
F. MITCHELL

CNH:ksa
LA95DA2024

APPENDIX E

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,	
Plaintiff and Respondent,	S055881
v.	
ANGEL JAIME MONGE,	
Defendant and Appellant.	

Second Appellate District, Division Three, No. B094905
Los Angeles County Superior Court No. KA025876
The Honorable Sam Cianchetti, Judge

RESPONDENT'S BRIEF ON THE MERITS

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. ANGEL JAIME MONGE, Defendant and Appellant.	S055881

STATEMENT OF THE CASE

This is a second-strike case filed under the Three Strikes Law (see Pen. Code,[1/] §§ 667, subds. (b) through (i) [legislative version], 1170.12 [voter's initiative]), whereby appellant was sentenced to state prison for 11 years.

In an amended information filed by the District Attorney of Los Angeles County, appellant was charged with adult using a minor in violation of Health and Safety Code section 11361, subdivision (a), (count I), sale or transportation of marijuana in violation of Health and Safety Code section 11360, subdivision (a), (count II), and possession of marijuana for sale in violation of Health and Safety Code section 11359 (count III). As to all counts, it was further alleged appellant suffered a prior serious or violent felony conviction within the meaning of the Three Strikes Law, and a prior prison term within the meaning

1. All further statutory references are to the Penal Code, unless otherwise indicated.

of subdivision (b) of section 667.5. Appellant pled not guilty and denied all special allegations. (CT 14-17, 20, 22, 33.)

Trial was by jury. The jury found appellant guilty as charged. Following a court trial on the prior, the court found the prior true, and sentenced appellant to state prison for 11 years, less 207 presentence custody credit days, as follows: the middle term of 5 years on count I, doubled to 10 years under the Three Strikes Law, plus 1 year under subdivision (b) of section 667.5. (CT 78-80, 82, 87-88.)

Appellant filed a notice of appeal from the judgment of conviction. (CT 89-90.) In an unpublished opinion, the California Court of Appeal affirmed the judgment of conviction, but reversed on insufficiency grounds the trial court's true finding as to the "strike" allegation (a 1992 assault conviction). The appellate court raised the insufficiency issue on its own motion, pursuant to which the parties filed supplemental letter briefs. The appellate court found "double jeopardy" barred respondent's request that this case be remanded for relitigation of the "strike" allegation.

ISSUES PRESENTED

1. Whether remand for a truthfulness proceeding as to a prior felony conviction violates double jeopardy principles.

2. Assuming no double jeopardy bar to remand, whether *People v. Reed* (1996) 13 Cal.4th 217, applies on remand.

STATEMENT OF FACTS

At about 4 p.m. on January 25, 1995, undercover officers from the Pomona Police Department driving an unmarked vehicle saw

appellant and a male juvenile (about 12 years old) standing in a rear alley near a carport area at 990 West Ninth Street in Pomona. The minor motioned for the officers to come in his direction. They complied. The officers rolled down their window, then asked where they could buy marijuana. Appellant subsequently gave the minor several "plastic baggies," and the minor sold the baggies to the officers for two marked $10 bills. The officers drove away, then reported appellant and the minor's description to other officers. Those officers arrested appellant and the minor. Appellant had the marked $10 bills on his person when he was searched incident to his arrest. (RT 61-77, 89-90.)

ARGUMENT

I.

ALLOWING RELITIGATION OF A PRIOR FELONY CONVICTION WOULD NOT VIOLATE PRINCIPLES OF DOUBLE JEOPARDY

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution, made applicable to California by way of incorporation into the Due Process Clause of the Fourteenth Amendment (*Benton v. Maryland* (1969) 395 U.S. 784, 794 [23 L.Ed.2d 707, 89 S.Ct. 2056]; *People v. Superior Court (Marks)* (1991) 1 Cal.4th 56, 71, fn. 13), provides, "nor shall any person be subjected for the same offence to be twice put in jeopardy of life or limb[.]" (*People v. Fields* (1996) 13 Cal.4th 289, 297.) "Protection against double jeopardy is also embodied in article I, section 15 of the California Constitution, which declares that '[p]ersons may not twice be put in jeopardy for the same offense.'" (*Id.*, at pp. 297-298.) "[F]ederal law sets the minimum standards of double jeopardy protection. Under California law, in some instances an accused may be entitled to greater double jeopardy protection than that afforded under the federal Constitution." (*Id.*, at p. 302 [citations omitted].) However, in the context of a truthfulness proceeding as to a prior conviction allegation, this Court has already concluded if the Double Jeopardy Clause of the federal Constitution is not implicated, neither is the parallel provision in the California Constitution. (See *People v. Saunders* (1993) 5 Cal.4th 580, 596; see also *People v. Latimer* (1993) 5 Cal.4th 1203, 1213 [discussing stare decisis].)

This Court is now asked to decide whether double jeopardy principles bar respondent from relitigating the truthfulness of a prior

felony conviction (in this case, alleged under the Three Strikes Law).[2] The "strike" allegation (a 1992 assault conviction) was found true by the court in a bifurcated proceeding, but reversed on appeal when the Court of Appeal (after *sua sponte* ordering further briefing) concluded respondent should have proved appellant personally inflicted great bodily injury within the meaning of subdivision (c)(8) of section 1192.7 and/or personally used a dangerous or deadly weapon within the meaning of subdivision (c)(23) of section 1192.7 as to appellant's prior assault.

For reasons explained below, respondent submits relitigating the truthfulness of a prior felony conviction allegation would not violate double jeopardy because this allegation is not an "offense" within the meaning of double jeopardy. Further, this Court's decision in *Morton* is sound, and governs here. (*People v. Morton, supra,* 41 Cal.2d at pp. 542, 544-545 [upon reversal of a prior conviction finding due to insufficient evidence, if the defect in proof is capable of correction on retrial, the proper remedy is a limited retrial on the prior conviction allegation] [*Morton* did not address the double jeopardy implications (if

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2. See *People v. Valladoli* (1996) 13 Cal.4th 590, 608 ["Assuming, without deciding, double jeopardy principles apply to allegations of prior convictions"], noting *People v. Saunders, supra,* 5 Cal.4th at p. 593 ["We assume, without deciding, that double jeopardy principles apply to allegations of prior convictions"]; *People v. Wiley* (1995) 9 Cal.4th 580, 593, fn. 8 ["We need not, and do not, decide whether a contrary holding that the evidence was insufficient would necessitate striking the enhancement or, instead, remanding the case to the trial court for a redetermination of whether the charges were separately brought"], citing *Caspari v. Bohlen* (1994) 510 U.S. 383, 392-397 [127 L.Ed.2d 236, 114 S.Ct. 948] [discussing, but not deciding, whether the federal double jeopardy clause applies to noncapital sentencing], and *People v. Morton* (1953) 41 Cal.2d 536, 541-545.

involved a remand for a *re*trial. *Moser* involved an appeal of a guilty plea entered following a misadvisement concerning consequences of the plea, and the court remanded for a hearing (not a trial) on the issue of prejudice. The decision in *Goodner* did not remand for a retrial but simply affirmed the judgment. The only remand that occurred in that defendant's case occurred in an earlier appellate decision that remanded for further proceedings following a reversal, not of a true finding on a prior conviction allegation based on insufficiency of evidence, but of *pretrial* orders *striking* prior serious felony *allegations*.

Respondent further claims that a remand for a retrial on the prior conviction allegation would not violate double jeopardy principles. We disagree. The double jeopardy clauses bar a retrial where a true finding on a prior conviction allegation is reversed based on insufficiency of the evidence. (*People* v. *Goodner* (1990) 226 Cal.App.3d 609, 613; *People* v. *Hockersmith* (1990) 217 Cal.App.3d 968, 972;[8] *People* v. *Brookins* (1989) 215 Cal.App.3d 1297, 1302-1309; *People* v. *Jones* (1988) 203 Cal.App.3d 456, 460;[9] see also *People* v. *Saunders* (1993) 5 Cal.4th 580, 583, where the Supreme Court stated, "We assume, without deciding, that double jeopardy principles apply to allegations of prior convictions.")[10]

Respondent's reliance upon *People* v. *Saunders*, *supra*, and *People* v. *Torres* (1996) 45 Cal.App.4th 640, is misplaced. Again, neither involved a remand for a *re*trial *where the evidence mustered by the People and submitted at a previous trial was*

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8 Disapproved on another point in *People* v. *Saunders* (1993) 5 Cal.4th 580, 597, fn. 9.

9 Disapproved on another point in *People* v. *Tenner* (1993) 6 Cal.4th 559, 566, fn. 2.

10 The issue of whether the double jeopardy clauses bar a retrial where a true finding on a Penal Code section 667, subdivision (a) enhancement allegation is reversed based on insufficiency of the evidence is presently before our Supreme Court in *People* v. *Hernandez* (S047306).

insufficient. Indeed, *Saunders*, as noted previously, *assumed* double jeopardy principles applied to prior conviction allegations. It is true that the case in *Saunders* was remanded for trial on a prior conviction allegation. However, trial proceedings on the prior conviction allegation in that case had been bifurcated and the jury had been discharged *before any trial on the prior conviction allegation had occurred*. Similarly, in *Torres*, appellant entered a plea bargain to a substantive offense, and the Three Strikes prior conviction allegation remained unresolved since appellant had not admitted it and the allegation *had never been tried*. *Torres* remanded for trial or other disposition of the allegation.

Since the trial court in the present case imposed sentence pursuant to a sentencing scheme (*People* v. *Stevens* (1988) 205 Cal.App.3d 1452, 1455-1458; *People* v. *Savala* (1983) 147 Cal.App.3d 63, 66-70) in which, even absent application of Penal Code sections 667, subdivisions (b) through (i), and 1170.12, subdivisions (a) through (d), sentencing discretion remains, we will vacate appellant's entire sentence and remand his case for resentencing only. (*People* v. *Menius* (1994) 25 Cal.App.4th 1290, 1294-1295.)[11]

DISPOSITION

We reverse the finding that appellant suffered a July 2, 1992, felonious assault conviction in case No. KA013241 within the meaning of Penal Code sections 667, subdivisions (b) through (i), and 1170.12, subdivisions (a) through (d), vacate his sentence, and remand the matter for resentencing consistent with this opinion. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

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11 We leave undisturbed the true finding as to the Penal Code section 667.5, subdivision (b) enhancement allegation.

No. 97-6146

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1996

ANGEL JAIME MONGE, Petitioner,

v.

STATE OF CALIFORNIA, Respondent.

PROOF OF SERVICE UNDER RULE 29.5(c)

I, F. MITCHELL, declare as follows:

I am over 18 years of age, and not a party to the within cause; my business address is 300 South Spring Street, Los Angeles, California 90013;

I served one copy of the **BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI** in the above-entitled case on each of the following person(s):

Cliff Gardner
Gardner & Derham
Ghirardelli Square
900 North Point
San Francisco, CA 94109

Jeffrey E. Thoma
Mendocino County Public Defender
3283 Ramos Circle
Sacramento, CA 95827

by placing same in an envelope(s) addressed to the post office address of each said person(s), and by sealing and then depositing each said envelope, on DEC 17 1997, in the United States mail at Los Angeles, California, with first-class postage thereon fully prepaid;

I thereby have served all parties required to be served.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on DEC 17 1997, at Los Angeles, California.

Declarant

F. MITCHELL

CNH:ksa
LA97US0006